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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROWN GROUP, INC. d/b/a
BROWN SHOE COMPANY, INC.,
Petitioner,

vs.

KENNETH O. HICKS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS M. HANNA*
FRED A. RICKS
PATRICIA M. MCFALL
MCMAHON, BERGER, HANNA, LINIHAN,
CODY & MCCARTHY
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
(314) 567-7350

Attorneys for Petitioner

*Counsel of Record

EUGENE J. JORDAN
Associate General Counsel
Brown Group, Inc.
P.O. Box 354
8500 Maryland Avenue
St. Louis, Missouri 63166

St. Louis Law Printing Co., Inc. 13307 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED

1. Whether the Eighth Circuit was in error when it determined that the discharge of Plaintiff, allegedly because of his race, white, was cognizable pursuant to 42 U.S.C. § 1981?

2. Whether the Eighth Circuit was in error when it affirmed the district court's finding of racially discriminatory discharge premised on a finding that race was a "discernible or motivating factor" which "played a part in but did not control" the employer's decision?

3. Whether the Eighth Circuit was in error when it affirmed the district court's finding of racially discriminatory discharge despite the jury's specific finding that even if race had not been a factor the employer would have made the "same decision" to terminate the plaintiff?

4. Whether the district court may grant additur of one dollar ($1.00) as nominal damages in circumstances where the jury found that a violation of 42 U.S.C. § 1981 occurred while also finding that plaintiff suffered no actual damages and awarding no monetary damages?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brown Group, Inc. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, *Hicks v. Brown Group, Inc.*, No. 88-2769/2817 (8th Cir. April 16, 1990), (App. A, pp. A-1 - A-48) is reported at 902 F.2d 635. The Memorandum of the District Court (Noce, Magistrate) (App. B, pp. B-1 - B-4) is not reported. The Jury Instructions and Special Interrogatories with Answers (App. C, pp. C-1 - C-4) are not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A, pp. A-1 - A-48) was entered on April 16, 1990. A timely Petition for Rehearing was denied on June 4, 1990 (App. D, p. D-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Section 1981 of Title 42 of the United States Code provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

Section 703 (a) of Title VII of the 1964 Civil Rights Act provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000-e(2)(a).

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

> Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

Rule 38 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) *Right Preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Fed. R. Civ. P. 38.

Rule 39 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) *By Jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

Fed. R. Civ. P. 39.

STATEMENT OF THE CASE

A. The Nature Of The Case

Kenneth G. Hicks, a white male, brought this action against his former employer, Brown Group. Hicks claimed that his race, white, and age, fifty-one, were factors which Brown Group unlawfully considered in terminating him from employment. The suit was brought under the Federal Age Discrimination in Employment Act, 29 U.S.C.

§ 621 *et seq.*, and under the Civil Rights Act of 1866, 42 U.S.C. § 1981. This case was tried to a jury. The jury rejected the age discrimination claim (App. C, p. C-2). The jury found that Brown Group intentionally discriminated against Hicks on account of his race and that race was a determining, or discernible or motivating, factor in his termination from employment. (Special Interrogatories 5 and 7, App. C. pp. C-3 - C-4). The jury had been instructed that Plaintiff was required to prove that his race was either a "determining," or "discernible or motivating," factor in the employment decision, and that the phrase "discernible or motivating factor" meant that the factor played a part but did not necessarily control the decision as to whether or not to retain or terminate Hicks (App. C, p. C-1). The jury found that Hicks suffered no actual damages (Special Interrogatory 6, App. C, p. C-3). The jury further found that Brown Group acted out of evil motive or intent or acted out of callous indifference to Plaintiff's federally protected rights and awarded him punitive damages in the amount of $10,000 (Special Interrogatories 8 and 9, App. C, p. C-4). The jury also found that Brown Group would have terminated Hicks from employment even had Hicks' race not been a discernible, motivating or determining factor (Special Interrogatory 10, App. C, p. C-4).

The District Court modified the jury's findings through a grant of additur and entered one dollar as nominal damages (App. B, p. B-3).

B. Material Facts

Brown Group is a corporation engaged in the business of manufacturing and selling shoes. As recently as the early 1970's Brown Group owned and operated 35 manufacturing facilities located in Missouri, Illinois, Tennessee, Kentucky and Arkansas, with warehouse and raw material terminals located in the St. Louis, Missouri area.

Hicks, a white male, was hired by Brown Group in February 1948 as an Order Clerk at the Company's Gustine Avenue finished goods warehouse in St. Louis, where he filled orders for finished goods for shipment. Hicks had a ninth grade education at the time he was employed by Brown Group, but he subsequently obtained a GED certificate in 1985, some three years after his termination. After twenty-four years of employment as an Order Clerk, Hicks was

promoted to foreman in December 1972. From 1972 until 1977, Hicks was a foreman in the Gustine Avenue finished goods warehouse, where he supervised the filling and packing of orders of finished goods for shipment. In late 1977, Brown Group's Gravois Avenue warehouse, containing the raw materials dock, was closed and most operations were transferred to Gustine Avenue. As a result, and in the same year, Hicks was assigned the task of working as a utility foreman where he filled in for other warehouse foremen who were absent from work for reasons such as illness, vacations, funerals or personal leave. As a utility foreman, Hicks substituted for some fifteen to twenty other foremen. It was then that Hicks worked the raw materials dock for the first time when he substituted for raw materials dock foremen, one of whom was Al Chester, the foreman who was retained when Hicks was terminated.

Chester, a black male, was employed by Brown Group in July 1968 following his discharge from military service. Chester had a high school education when hired and has since completed two years of college. Chester was promoted to foreman in January 1973, approximately one month after Hicks' promotion to foreman.

Because of declining sales caused by foreign competition, Brown Group was forced to close ten of its northernmost factories and to revamp its warehouse and terminal operations. In May of 1980, the Gustine Avenue warehouse and dock in St. Louis was closed and the raw materials dock was moved to Brown Group's Chouteau Avenue warehouse, also in St. Louis. Hicks did not transfer to the Chouteau Avenue warehouse, but was instead assigned to a warehouse in Fredericktown, Missouri for approximately one month. Chester, on the other hand, as a raw materials dock foreman, was transferred immediately to the Chouteau warehouse, where he worked the evening shift until Hicks was reassigned from Fredericktown. While the extent of training is in dispute, Chester did spend time training Hicks to work on the raw materials dock at the Chouteau warehouse. Hicks then assumed responsibilities for the evening shift and Chester transferred to the day shift.

By April 1982, Brown Group relocated its raw materials terminal from St. Louis to Benton, Missouri in order to better serve its Southern factories. Chester was immediately assigned to the Benton terminal as foreman over the evening shift.

Because of delivery delays and operational problems at the Benton terminal, Brown Group decided to hire an outside trucking company to presort raw materials and to assume responsibilities for some deliveries. As a consequence of that decision, the amount of work at the Benton terminal decreased significantly, and Brown Group decided to decrease its hourly employees from seventeen to twelve, and the supervisory staff from three to two. Terminal Manager, Rich Williams, was given the responsibility of making the decision as to the supervisors to be terminated and the supervisors to be retained. Williams selected Hicks for termination and decided to retain Chester, a thirty-six-year-old black male, and Robert Carbrey, a fifty-five-year-old white male. Hicks was advised that he was being terminated because Chester had more experience on raw materials docks, was more acquainted with the Benton terminal operation, and was better able to handle the job.

Hicks testified that after being advised of his termination, he returned to the Benton terminal on June 28, 1982, to pick up his personal belongings, and at that time, he asked Williams whether he had been terminated because he was white and Chester was black, whereupon Williams reportedly replied, "Ken, you said that, not me." Hicks testified that he re-asked this question and that Williams looked at him with a side smirk and said, "Again, you said that, not me." Williams denied stating that race was a factor as well as having made a "smirk" when talking with Hicks.

Brown Group had no seniority system or any other structured system for the administration of layoffs. When layoff decisions were made, they were made by the superintendent and reviewed by his supervisor. Both Hicks and Chester accepted a voluntary reduction in salary at the time of their transfer to the Benton facility. Following Hicks' termination, he was never replaced.

C. The Court of Appeals' Rulings

Brown Group appealed the judgment of the district court asserting, *inter alia*, that: (1) The court lacked jurisdiction pursuant to 42 U.S.C. § 1981; (2) the jury's findings were clearly erroneous and not supported by sufficient evidence; (3) the court's granting of additur was prohibited as a violation of Brown Group's Seventh Amendment right to trial by jury; (4) the Instructions and Special Interrogatories incorrectly instructed the jury on the applicable legal standard, by relying upon the phrase "discernible or motivating factor" and (5) the fact that the jury found that Hicks would have been terminated regardless of race, pursuant to a "same decision" test special interrogatory, required dismissal of the claim of reverse race discrimination. This latter issue was raised in Brown Group's Reply and Answer to Hicks' Cross Appeal Brief just after this Court's decision in *Price Waterhouse v. Hopkins*, __ U.S. __, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Hicks cross-appealed because of the district court's denial of his Post-Trial Motion for Reinstatement and Related Equitable Relief. Both the appeal and cross-appeal were unsuccessful and the judgment of the district court was affirmed by a two-to-one vote, with one judge dissenting on the basis that this Court's decision in *Patterson v. McLean Credit Union*, __ U.S. __, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), controlled as a legally relevant decision interpreting 42 U.S.C. § 1981 as a Act which provided relief only when the claims went to the making and enforcement of contracts, rather than post-formation conduct relating to the terms and conditions of continuing employment. Both Brown Group and Hicks petitioned for rehearing with suggestions for rehearing in banc and both Petitions were denied on June 4, 1990 by reason of a lack of majority of the active Judges voting to rehear the case (four active Judges voted to grant the Petitions).

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The United States Court of Appeals for the Eighth Circuit has ruled on matters of exceptional importance in a manner which conflicts with no less than two recent decisions of the United States Supreme Court: *Patterson v. McLean Credit Union*, __ U.S. __, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) and *Price Waterhouse v. Hopkins*, __ U.S. __, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Moreover, the Eighth Circuit's decision violated the long standing rule against additur. *Dimick v. Schiedt*, 293 U.S. 474 (1935). This case first raises the fundamental question whether the discharge of an employee, allegedly motivated by racial considerations, is cognizable under the Civil Rights Act of 1866, 42 U.S.C. § 1981. In the event this Court should determine that employee discharge is actionable pursuant to 42 U.S.C. § 1981, two issues arise as to whether the Eighth Circuit follows the appropriate legal standard in determining liability and whether the jury's finding that Brown Group would have made the "same decision" even if race had not been a factor mandates a reversal of the judgment below. Finally, there is a significant issue created by the trial court's grant of one dollar ($1.00) as nominal damages notwithstanding the jury finding that plaintiff had suffered no actual damage.

This Petition should be granted because only this Court can answer the questions raised, resolve the conflicts created, and rectify the wrong that has been done to the Petitioner.

I. This Decision Of The United States Court Of Appeals For The Eighth Circuit Is Clearly In Conflict With The Decisions Of No Less Than Three Other Circuits Of The United States Court of Appeals Which Have Held That Allegations Of Discriminatory Discharge Are Not Cognizable Under 42 U.S.C. § 1981.

The two-to-one decision of the panel of the United States Court of Appeals for the Eighth Circuit held that an action for damages for discriminatory discharge could be maintained pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981. *Hicks v. Brown Group, Inc.*, App. A at A-14. The Eighth Circuit's opinion is in conflict with the

clear decision of this Court that Section 1981 is not a "general proscription of racial discrimination in all aspects of employment relations, for it expressly prohibits discrimination only in the making and enforcement of contracts." *Patterson*, __ U.S. at __, 109 S.Ct. at 2372, 105 L.Ed.2d at 150. This Court explained that "making a contract" under Section 1981 did not encompass "conduct of the employer after the contract relation has been established, including breach of the terms of the contract." *Id.* at __, 109 S.Ct. at 2373, 105 L.Ed.2d at 151.

While this Court did not rule directly on the issue of discriminatory discharge it took great care to define the limited scope of Section 1981 and to admonish courts that "a lower court should give a fair and natural reading to the statutory phrase 'the same right . . . to make contracts' . . . and should not strain in an undue manner the language of Section 1981." *Id.* at __, 109 S.Ct. at 2377, 105 L.Ed.2d at 156. Notwithstanding this admonition, the panel majority strained the language of Section 1981 to reach the conclusion that discriminatory discharge violates the protected right to make a contract by relying upon legislative history not applicable to the concept of discrimination in employment. *Hicks*, App. A. at A-21 - A-33. This finding clearly ignores this Court's analysis of Section 1981 which stated:

> "The most obvious feature of the provision [Section 1981] is the restriction of its scope to forbidding discrimination in the '[mak]ing and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these rights, 1981 provides no relief.
>
> * * *
>
> "[T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract. . . .
>
> * * *
>
> "The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to

> enforce through legal process his or her established contract rights."

Patterson, __ U.S. at __, 109 S.Ct. at 2372-73, 105 L.Ed.2d at 150-51. Further, this Court made it plain that Title VII, where applicable, provides the exclusive statutory prohibition and remedy for discrimination except where a protection was specified with particularity:

> "By reading Section 1981, not as a general proscription of racial discrimination in all aspects of contract relations, but as limited to the enumerated rights within its expressed protection, specifically the right to make and enforce contracts, we may preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws."

Id. at __, 109 S.Ct. at 2375, 105 L.Ed.2d at 154.

Following *Patterson*, every court of appeals which has had occasion to rule upon the issue has determined that discharge is not cognizable pursuant to 42 U.S.C. § 1981. *See Carroll v. General Accident Ins. Co.*, 891 F.2d 1174 (5th Cir. 1990), *reh'g denied*, No. 89-2525 (5th Cir. Feb. 28, 1990); *Lavender v. V & B Transmissions & Auto Repairs*, 897 F.2d 805 (5th Cir. 1990); *McKnight v. General Motors Corp.*, Nos. 89-1379, 89-1526 (7th Cir. July 2, 1990) (LEXIS, Genfed library, 7 Cir file) (rehearing pending); *Courtney v. Canyon TV & Appliance Rental*, 899 F.2d 845 (9th Cir. 1990); and *Overby v. Chevron U.S.A. Inc.*, 884 F.2d 470, 472-73 (9th Cir. 1989); *see also NAACP v. Detroit Police Officers Ass'n*, 900 F.2d 903 (6th Cir. 1990), *reh'g denied*, No. 88-1902 (6th Cir. June 18, 1990) (en banc) (holding that an alleged discriminatory layoff may not be a violation of § 1981); *Sherman v. Burke Contracting*, 891 F.2d 1527, 1534-35 (11th Cir. 1989), *reh'g denied*, No. 88-8382 (11th Cir. Jan. 16, 1990) (holding that a claim of "retaliation" does not implicate the right to make a contract and such conduct is protected under Title VII and, therefore, § 1981 does not apply).

The great majority of district courts which have ruled on the issue of whether or not discharge is cognizable under 42 U.S.C. § 1981 have determined that jurisdiction is not present in reliance upon this Court's

opinion in *Patterson*. *See Malekian v. Pottery Club of America, Inc.*, 724 F.Supp.1279 (D. Colo. 1989); *Crader v. Concordia College*, 724 F.Supp. 558, 562 (N.D. Ill. 1989); *Johnson v. United States Elevator Corp.*, 723 F.Supp. 1344 (E.D. Mo. 1989); *Morgan v. Kansas City Area Transportation Authority*, 720 F.Supp. 758 (W. D. Mo. 1989); *Rivera v. AT&T Systems*, 719 F.Supp. 962, 964-65 (D. Colo. 1989); *Hall v. Country of Cook*, 719 F.Supp. 721 (N.D. Ill. 1989); *Greggs v. Hillman Distributing Co.*, 719 F.Supp. 552 (S.D. Tex. 1989); *Busch v. Pizza Hut, Inc.*, 52 FEP Cases 407 (N.D. Ill. 1989); *Carroll v. General Motors Corp.*, 52 FEP Cases 185 (D. Kan. 1989); *Bush v. Union Bank*, 52 FEP Cases 18 (W.D. Mo. 1989); *Madison v. NKC Conveyor Installation Co.*, 51 FEP Cases 1860 (E.D. Ky. 1990); *Guzman v. El Paso Natural Gas Co.*, 51 FEP Cases 1767 (W.D. Tex. 1990); *Meyers v. City of Cincinnati*, 728 F.Supp. 477 (S.D. Ohio 1990); *Cook v. Marriott Corp.*, 51 FEP Cases 922 (D. N.J. 1989); *Leong v. Hilton Hotels*, 50 FEP Cases 738 (D. Hawaii 1989); *Copperidge v. Terminal Freight Handling*, 50 FEP Cases 812 (W.D. Tenn. 1989); *Carter v. Aselton*, 50 FEP Cases 251 (M.D. Fla. 1989); *Owens v. Footlocker*, 52 FEP Cases 968 (E.D. Pa. 1989); *Van Abrahams v. Pioneer Electronics*, 52 FEP Cases 1010 (C.D. Cal. 1989); *James v. Dropsie College*, 52 FEP Cases 1204 (E.D. Pa. 1989); *Asari v. Syms, Inc.*, 52 FEP Cases 1049 (E.D. N.Y. 1989). *Contra Booth v. Terminex International*, 722 F.Supp. 675 (D. Kan. 1989); *Padilla v. United Airlines, Inc.*, 716 F.Supp. 485 (D. Colo. 1989); and *Carroll v. Elliott Personnel Services*, 51 FEP Cases 1173 (D. Md. 1989).

The Eighth Circuit asserts that it lacks clear direction from the Supreme Court on this issue, and, accordingly, will not consider the discharge of an employee to be excluded from the protection of 42 U.S.C. § 1981. *Hicks*, App. A at A-20 - A-21. Nevertheless it is clear, as evidenced by *Patterson*, that discharge is excluded from the ambit of Section 1981. It is equally clear that the Eighth Circuit is out of step with this Court and all other circuits which have addressed this matter. The issue of discharge and Section 1981 jurisdiction will continue to confront and confound trial courts and litigants alike until the issue is settled in a manner so unequivocal that even a recalcitrant court of appeals will not hesitate to follow the law of the land. Therefore, it is

in the interest of the administration of justice for this Court to promptly issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

II. The Court of Appeals Has Failed To Follow The Legal Principles Established By This Court For Determining Whether Or Not Racial Discrimination Occurred In The Context Of A Mixed Motive Case.

This case was tried as a "mixed motive" case at the plaintiff's request. At the time of trial it was clear that the Eighth Circuit was applying an improper legal theory that virtually mandated a plaintiff's verdict in a mixed motive case.

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court held that where motivation was an issue in the decision not to rehire a public employee the employee was required to prove that conduct, which he claimed to be "constitutionally protected", was the "substantial" or "motivating" factor in the decision not to rehire. *Id.* at 287. This Court rejected a concept that the employee need only prove that the protected conduct "played a part" in the decisional process. *Id.* at 285. Notwithstanding this clear signal, and this Court's later decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Eighth Circuit created a totally different standard by its decision in *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985). The Eighth Circuit held that if race was a minor or "discernible" factor in an employment decision such proof established a violation of Title VII warranting remedy. 778 F.2d at 1321 n.4, 1324. In *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), the Eighth Circuit held that the adjectives "determining" and "motivating" incorrectly instructed the jury as to the principles to be applied to determine liability, 856 F.2d at 1101-02, and established a two stage test of discrimination. First, there was to be a determination whether race was a "determining" factor and, if so, liability and reinstatement would follow. Stage two was described as follows: "If race was not a determining factor, but was a discernible or motivating one (a sort of lesser included offense in cases where the evidence allows an inference that mixed motives were involved) . . . [then] judgment and . . .

fees . . . but not . . . reinstatement" should be the relief ordered. *Id.* at 1102. In this unique and confusing atmosphere, the trial court, in this cause, propounded Instruction No. 9 which stated:

> Plaintiff is required to prove that his race or his age was either a determining factor or a discernible or motivating factor in the defendant's decision to remove plaintiff from his position.
>
> The term "determining factor" means a factor which made a difference in determining whether or not plaintiff was to be retained or terminated.
>
> The term "discernible or motivating factor" means a factor which was one among two or more factors that played a part in, but did not necessarily control, the decision whether or not to retain or to terminate plaintiff.

App. C, p. C-1

The court also propounded Special Interrogatories No. 5, 6, and 7 which, with their answers, are relevant here:

> 5. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a determining factor in his termination from employment by defendant?
>
> Answer: Yes.
>
> 6. What back pay and benefits of employment do you, the jury, unanimously find by a preponderance of the evidence that plaintiff has lost from the date of his termination to today as a direct result of the facts found by the jury with respect to Question No. 5?
>
> Answer: None.
>
> 7. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account

of his race in that his race was a discernible or motivating factor in his termination from employment by defendant?

Answer: Yes.

App. C, pp. C-3 - C-4.

It is manifest that such instructions were inconsistent with *Mt. Healthy*, and this Court's subsequent opinion in *Price Waterhouse*.

The jury was instructed in such a manner that if it determined that race "played a part in" the decision to terminate employment that ended its inquiry into liability. This is the result Hopkins unsuccessfully urged upon this Court in her case. *Price Waterhouse*, __U.S. at __, 109 S.Ct. at 1784, 105 L.Ed.2d at 280. This Court rejected that argument and held that there must first be proof that race was a "motivating part" of the decisional process meaning a showing that race was, in fact, a reason relied upon for the decision. *Id.* at __, 109 S.Ct. at 1787, 1790-91, 105 L.Ed.2d at 284, 287-88. Therefore the jury should have been instructed that (1) there must be a finding that race played a "motivating part" in the decision to terminate, (2) "motivating part" meant that race was "actually relied" upon and (3) if motivation were found but Brown Group proved it would have made the "same decision" regardless of race the verdict should be for defendant. It is no excuse that *Price Waterhouse* had not issued at the time of trial because it was clear from the *Mt. Healthy* decision that liability may not be cavalierly implied in a Title VII case. While this case is premised on Section 1981 rather than Title VII, the applicability of *Mt. Healthy* is even more obvious because this Court, in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982), made it crystal clear that Section 1981 violations could not be established by "minor" considerations when it stated: "We conclude . . . that [Section] 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination." 458 U.S. at 391. Since the Equal Protection Clause was at issue in *Mt. Healthy* it is apparent that *Mt. Healthy* principles should have been applicable to *Estes* and to this case. Because of *Bibbs* and *Estes* the trial court gave instructions and interrogatories which were patently erroneous and confusing. The errors in the instructions and interrogatories are so profound, and the obduracy of the Eighth Circuit with

respect to its *Bibbs* and *Estes* decisions is so great, that this Court should issue a Writ of Certiorari forthwith.

III. The Eighth Circuit Has Refused To Follow The Same Decision Test Established By This Court's Decisions In *Price Waterhouse* and *Mt. Healthy* In Spite Of A Jury's Finding For Defendant On That Very Issue.

Pursuant to the *Bibbs* and *Estes* decisions the trial court propounded Special Interrogatory No. 10 and received the following answer:

> 10. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., would have terminated plaintiff Kenneth Hicks from employment, even had plaintiff's race or age not been a discernible or motivating factor or a determining factor in the decision to terminate?
>
> Answer: Yes.

App. C, p. C-4.

Price Waterhouse plainly held that even if a prohibited factor such as sex or race played a part in the employment decision the employer would not be liable if it were shown that the "same decision" would have been made regardless. __U.S. at __, 109 S.Ct. at 1787-88, 104 L.Ed.2d at 284. *Price Waterhouse* is entirely consistent with *Mt. Healthy* in this respect and Special Interrogatory No. 10 would be a model question but for the use of the words "discernible" and "determining" as factors. However because the inaccurate verbiage was used as alternatives to "motivating" factor, no harm inured to plaintiff and, consequently, there was no reason why the Eighth Circuit should not have given effect to the jury's verdict. The court panel attempted to "sweep this problem under the rug" by ignoring Brown Group's Reply and Answer to the Cross-Appeal. Therefore, even if this Court should determine that discharge is cognizable under Section 1981, it should nonetheless grant this Petition and issue a Writ of Certiorari because of the Eighth Circuit's refusal to follow the "same decision" test mandated by *Price Waterhouse* and *Mt. Healthy*.

IV. The Court Of Appeals Has Failed And Refused To Follow The Constitution Of The United States And a Decision Of This Court By Ignoring The Prohibition Against Additur.

Special Interrogatory No. 6 (App. C, p. C-3), accurately reflects the jury's verdict that Plaintiff suffered no actual damages by reason of the alleged discrimination. Judge McMillian, writing for the majority, characterized the actions of the district court adding one dollar in actual damages as "additur". *Hicks* App. A at A-39 - A - 41, A-48. A grant of additur is impermissible as a violation of the Seventh Amendment right to trial by jury. *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935). This Court has just affirmed the right to trial by jury of Section 1981 allegations in *Lytle v. Household Manufacturing Inc.*, __U.S. __, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990).

The Eighth Circuit seeks to avoid the prohibition against additur by implying that whenever a violation of Section 1981 is found, a Plaintiff becomes automatically entitled to nominal damages even if no other damages are found. *Hicks*, App. A at A-40 - A-41. In this case, the issue of damages was hotly contested and the jury, in its deliberations, determined that no damages had been incurred by Hicks. It is manifest that this grant of additur deprives Brown Group of its constitutional right to trial by jury.

Hicks considered the additur of one dollar in nominal damages essential because without actual damages there can be no punitive damages. Thus 42 U.S.C. § 1981 is "deficient" with respect to remedies within the meaning of 42 U.S.C. § 1988 so that the law of the State of Missouri governs Hicks' ability to recover punitive damages. *Smith v. Wade*, 461 U.S. 30 (1983). Under Missouri law, Hicks could not recover his $10,000 punitive damage award because of the absence of nominal damages. *Compton v. Williams Bros. Pipeline Co.*, 499 S.W.2d 795, 797 (Mo. 1973); *Ashcroft v. Kansas City Firefighters Local #42*, 672 S.W.2d 99, 126 (Mo. App. 1984); *Melville v. Cheryl Scott Real Estate Co.* 664 S.W.2d 529 (Mo. App. 1983). Consequently, the verdict of the jury finding no actual damages is *res judicata* and Hicks was not entitled to additur or the award of punitive damages. *Williams Bros. Pipeline*, 499 S.W.2d at 797-98.

Therefore this Court is squarely confronted with a conflict between the Constitution of the United States and the case law interpreting the Seventh Amendment and the Eighth Circuit's assumption of the right to grant additur so long as it is nominal in amount. Brown Group submits that it was patently improper for the trial court to usurp the exclusive province of the jury by granting additur and, therefore, this petition for Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Thomas M. Hanna*
Fred A. Ricks
Patricia M. McFall
McMahon, Berger, Hanna,
Linihan, Cody & McCarthy
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
Telephone: (314) 567-7350

Attorneys for Petitioner

Eugene J. Jordan
Associate General Counsel
Brown Group, Inc.
P.O. Box 354
8500 Maryland Avenue
St. Louis, Missouri 63166

July, 1990

*Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 88-2769/2817

Kenneth G. Hicks,

Appellee/cross-appellant,

v.

Brown Group, Inc., d/b/a Brown Shoe Company, Inc.,

Appellant/cross-appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: September 13, 1989
Filed: April 16, 1990

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

McMILLIAN, Circuit Judge.

Brown Group, Inc., d/b/a Brown Shoe Company, Inc. (Brown Group), appeals from a final judgment entered by the United States District Court[1] for the Eastern District of Missouri upon a jury verdict finding that it violated 42 U.S.C. §1981 (1982) (Section 1981), by discharging Kenneth G. Hicks (Hicks) on the basis of his race. The jury found that Hicks was entitled to no actual damages, but awarded him $10,000 in punitive damages on the ground that Brown Group's action was willful. The district court modified the actual damages to $1.00 and awarded Hicks attorneys' fees and costs. On appeal, Brown Group raises four major issues for reversal: (1) the judgment cannot stand because discriminatory discharge is not cognizable under Sec-

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[1] The Honorable David D. Noce, United States Magistrate for the Eastern District of Missouri, to whom the matter was referred for trial and entry of judgment by consent of the parties pursuant to 28 U.S.C. §636(c) (1982 & Supp. V 1987).

tion 1981; (2) the district court erred in denying its motion for a judgment notwithstanding the verdict (JNOV) because the jury's finding of discrimination was clearly erroneous and not supported by sufficient evidence; (3) the district court erred in submitting jury instructions and special interrogatories which permitted the jury to find a Section 1981 violation without proof of intentional discrimination; and (4) the district court erred in denying its motion for a JNOV on the punitive damages award. Brown Group also claims that the punitive damage award was not supported by sufficient evidence. On cross-appeal, Hicks alleges that the district court erred in denying his post-trial motion for reinstatement and related equitable relief after he had successfully proven that he would not have been discharged except for his race. For the reasons discussed below, we affirm the judgment of the district court.

I. Facts

Brown Group is a New York corporation engaged in the business of manufacturing and selling shoes.[2] In the early 1970s, Brown Group owned and operated approximately 35 manufacturing plants located in Missouri, Illinois, Tennessee, Kentucky and Arkansas. Until the early 1980s, Brown Group's warehouse facilities and raw materials terminals were located in St. Louis. Because of declining sales caused by foreign competition, Brown Group was forced to gradually close ten of its northernmost factories by 1982.

In 1982, Brown Group relocated its raw materials terminal from St. Louis to Benton, Missouri (Benton terminal) in order to better service its southern factories.[3] Because of delivery delays and operational problems at the Benton terminal, Brown Group decided to hire CMR Parcel Service, an outside trucking company, to presort raw materials

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[2] Brown Group is well known for its production of the "Buster Brown" line of children's shoes.

[3] The Benton terminal is designed to increase efficiency and facilitate distribution. Drivers transport raw materials from the Benton terminal to Brown Group factories, and transport finished goods from the factories back to Benton. Finished goods are not warehoused at the Benton terminal.

and take over some of the delivery routes. As a result, the amount of work at the Benton terminal decreased significantly. Brown Group decided that the loss of work required a reduction of force at the Benton terminal. Neil Page, Brown Group's assistant director of distribution, directed Rich Williams, the Benton terminal superintendent, to decrease the number of hourly union employees by five, from 17 to 12, and reduce the supervisory staff by one, from three to two. Page gave Williams no guidelines concerning who should be terminated or what factors should be considered in making the decision. This action arises from Brown Group's decision to terminate Hicks, a 51-year-old white male supervisor, and retain Alvin Chester, a 36-year-old black male supervisor.[4]

Hicks started working for Brown Group in February 1948 as a 16-year-old. He worked for Brown Group for 34 years, until he was discharged at age 51 in 1982. Hicks began working as an order clerk in the finished goods warehouse, and held that position for 25 years. On December 4, 1972, Hicks was promoted to a foreman position at the Gustine Avenue warehouse in St. Louis. While at Gustine Avenue, Hicks supervised every department in the warehouse, overseeing the filling and packing of finished orders. Between late 1977 and May 1980, Hicks held the evening utility foreman position at the Gustine Avenue warehouse, where he filled in for 15 to 20 other foremen who were absent from work because of illness, vacation, or personal reasons. During this period, Hicks obtained experience supervising the manufacturing or raw materials dock. In May 1980, the Gustine Avenue warehouse closed, and the raw materials dock was moved to the Chouteau Avenue warehouse in St. Louis.

In June 1980 Hicks was assigned to supervise the evening shift on the raw materials dock at the Chouteau Avenue warehouse. When Hicks began working this new position, he was briefly trained by Alvin Chester, who held the evening supervisor position at the Chouteau

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[4] The third supervisor was Robert Carbrey, a white male approximately 55 years of age. Carbrey was the assistant terminal superintendent at Benton and had more responsibility than Hicks and Chester. He was not a candidate for discharge. Hicks does not challenge the retention of Carbrey.

Avenue warehouse prior to Hicks' arrival.[5] After Hicks was trained, Chester was assigned to supervise the day shift. When the Chouteau Avenue warehouse closed, Hicks was assigned to supervise the evening shift at the Benton terminal. Chester, who began working at the Benton terminal about a month and a half before Hicks,[6] briefly trained Hicks and again transferred to the day shift when Hicks took over the evening shift.[7]

In July 1968 Chester began working on the raw materials dock as an hourly union employee at Brown Group's Gravois Avenue manufacturing plant in St. Louis. He was promoted to dock foreman in January 1973,[8] where he supervised four or five employees. When the Gravois Avenue plant closed in 1975, Chester was transferred to the Gustine Avenue warehouse, where he supervised between eight and ten employees on the raw materials dock. When the Gustine Avenue warehouse closed in 1980, Chester was assigned to the Chouteau Avenue warehouse, where he supervised operations on the raw materials dock until the facility closed in April 1982. Chester was transferred to the Benton terminal in April 1982.[9]

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[5] The parties dispute how long Chester trained Hicks at Chouteau. Hicks testified that Chester familiarized him with the truck schedules and procedures for about eight hours over a two night period. Chester testified that he trained Hicks for two to three weeks.

[6] Chester did not begin working at the Benton terminal until May 17, 1982, because he obtained company approval to undergo a needed hernia operation before transferring to Benton.

[7] The parties also dispute how long Chester trained Hicks at the Benton terminal. Hicks testified that Chester worked with him for two or three days, whereas Chester testified that he trained Hicks over a two week period.

[8] Although Brown Group claims that Chester has been a full-fledged supervisor since January 1973, Chester's performance evaluations listed his position as "Assistant Supervisor" as recently as September 1978.

[9] Chester was promoted to the position of terminal superintendent at Benton in 1985.

Rich Williams, the Benton terminal superintendent, made the decision to terminate Hicks and retain Chester. At the time he was terminated, Hicks had worked for Brown Group for more that 34 years, the last nine and a half years as supervisor. At the time Chester was retained, he had 14 years service for Brown Group, and about the same supervisory experience as Hicks.[10] Williams testified that he decided to retain Chester because Chester was better qualified to supervise the raw material operation at the Benton terminal. Hicks claimed that Chester was retained because he was black, and that he (Hicks) was terminated in violation of a company policy to make employment decisions based on seniority.

Williams notified his supervisor, Neil Page, that he had decided to terminate Hicks, and Page agreed with the decision. On June 28, 1982, Hicks was summoned to Brown Group's corporate offices for a meeting with Page and Williams. Page informed Hicks that he was chosen to be terminated as a result of the changes in operation at the Benton terminal. Page told Hicks that Chester was being retained because he had more experience on the raw materials dock, knew more about the Benton terminal operation, and was better able to handle the job.

After his June 28, 1982 meeting with Page and Williams in Clayton, Hicks returned that same afternoon to the Benton terminal to gather his personal belongings and say good-bye to his co-workers on the night shift. While he was at the terminal, Hicks asked Williams whether he had been terminated because he was white and Chester was black. Hicks testified that although Williams heard and understood his question, Williams did not deny that race was a consideration, instead replying "Ken, you said that, not me." Hicks did not understand this response, so he asked Williams a second time whether race made a difference. Hicks testified that Williams looked at him with a side

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[10] Hicks had been a supervisor abut one month longer than Chester. Hicks was promoted to supervisor in December 1972, followed by Chester in January 1973.

smirk, and said," Again, you said that, not me."[11] After Hicks' termination, Williams transferred Chester to the evening shift, and Page ordered that Chester be given a $25.00 raise. Brown Group did not hire another supervisor to replace Hicks.

Hicks exhausted his administrative remedies and filed suit in federal district court, alleging that Brown Group's decision to discharge him violated Section 1981 and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987). The case was tried before a jury on October 3-5, 1988. The jury rejected Hicks' age discrimination claim,[12] Special Interrogatories Nos. 1-3, but found that Brown Group had intentionally discriminated against Hicks on the basis of his race "in that his race was a discernible or motivating factor in his termination from employment," Special Interrogatory No. 7. The jury also found that Brown Group "intentionally discriminated against . . . Hicks on account of his race in that his race was a determining factor in his termination from employment," Special Interrogatory No. 5. The jury found that Hicks was entitled to no compensatory damages, but awarded him $10,000 in punitive damages after finding that Brown Group "acted out of evil motive or intent, or acted with callous indifference to [Hicks'] federally protected rights," Special Interrogatory No. 8. Finally, in response to Special Interrogatory No. 10, the jury found that Brown Group would have terminated Hicks even if his race or age had "not been a discernible or motivating factor or a determining factor in the decision to terminate." The jury was not requested to consider the question of nominal damages.

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[11] Williams admitted that he had a conversation with Hicks on the afternoon of June 28, 1982, but testified he told Hicks that race was not a factor in his termination. Williams testified that he answered Hicks's question directly the first time Hicks asked it, and that he did not smirk at Hicks. Brown Group argued to the jury that Hicks's description of this conversation was inconsistent and had been embellished over time. The jury evidently chose to reject Brown Group's contention that Hicks' testimony on this incident was fabricated or inconsistent.

[12] Hicks has not cross-appealed the jury verdict on the age discrimination claim.

After modifying the jury verdict through a grant of additur in the amount of $1.00 nominal damages, the district court enforced the jury verdict by awarding Hicks $10,000 in punitive damages. Brown Group's motion for a JNOV and Hicks' motion for post-trial equitable relief were denied. The district court subsequently awarded Hicks $18,562.50 in attorneys' fees and $2,189.00 in costs. This timely appeal and cross-appeal followed. After the United States Supreme Court decision in *Patterson v. McLean Credit Union*, 491 U.S. __, 109 S.Ct. 2363 (1989), this court granted leave for the parties to file supplemental briefs.

II. Section 1981

The threshold question we must address in this reverse race discrimination case is whether racially discriminatory discharge is actionable under Section 1981. Section 1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

In *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989) (*Patterson*), the United States Supreme Court limited the scope of Section 1981. The Court interpreted the meaning and scope of the rights "to make and enforce contracts," and held that neither right extended to prohibit racial harassment in the employment relationship. *Id.* at 2373-74. The *Patterson* decision did not address whether discriminatory discharge falls within the ambit of the rights to make and enforce contracts. Based on our examination of the nature of discharge and our interpretation of Section 1981, we conclude that a claim for discriminatory discharge continues to be cognizable under Section 1981.

A.

We must first determine whether a fair reading of *Patterson* requires us to find that discriminatory discharge is no longer actionable under Section 1981. A careful analysis of *Patterson* demonstrates that discharge was not at issue or discussed, and nothing in that opinion requires us to overrule the numerous and long-settled cases in this circuit which hold that discriminatory discharge is actionable under Section 1981. *See, e.g., Estes v. Dick Smith Ford*, 856 F.2d 1097, 1100-01 (8th Cir. 1988); *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1268 (8th Cir. 1981); *Person v. J.S. Alberici Constr. Co.*, 640 F.2d 916, 918-19 (8th Cir. 1981).

We first examine the facts and procedural history of *Patterson* in order to better understand its analysis of the rights to make and enforce contracts. In *Patterson*, the plaintiff was a black woman who was employed as a teller and file coordinator for ten years before being laid off. She brought an action in the United States District Court for the Middle District of North Carolina, alleging that her employer had harassed her, failed to promote her, and discharged her because of her race in violation of Section 1981.[13] 109 S.Ct. at 2368-69. The district court submitted the Section 1981 discharge and promotion claims to the jury, which returned a verdict for the employer. The district court determined that Patterson's claim for racial harassment was not actionable under Section 1981, and granted a directed verdict in favor of the employer.

On appeal,[14] the Fourth Circuit affirmed. *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986). The court held that racial harassment was not cognizable under Section 1981, but noted that evidence of racial harassment may implicate the terms and conditions

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[13] The plaintiff also raised a pendent state law claim for the intentional infliction of emotional distress. The district court granted a directed verdict for the employer on this issue, and the Fourth Circuit affirmed. *See Patterson v. McLean Credit Union*, 805 F.2d 1143, 1146 (4th Cir. 1986).

[14] The plaintiff appealed the district court's award of directed verdicts in favor of the employer on the Section 1981 racial harassment claim and the

(Footnote 14 continued on Page 9)

of employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), or be probative of the discriminatory intent required to prove a Section 1981 violation. *Id.* at 1145. In discussing its ruling on the harassment claim, the Fourth Circuit expressly noted that a claim of discriminatory discharge goes to the very essence of the employment contract, and thus falls easily within Section 1981's protection. *Id.*

The Supreme Court granted certiorari, *see* 484 U.S. at 814 (1987), to decide two questions: (1) whether Patterson's racial harassment claim was actionable under Section 1981, and (2) whether a jury instruction requiring her to prove that she was better qualified to establish her Section 1981 promotion claim was erroneous. *Patterson*, 109 S.Ct. at 2369. After initial oral argument, the Court requested the parties to brief and argue whether or not the Court should reconsider the interpretation of Section 1981 adopted in *Runyon v. McCrary*, 427 U.S. 160 (1976) (*Runyon*), which held that Section 1981 prohibited discrimination in making and enforcement of private contracts. *See* 485 U.S. at 617 (1988).

The Court unanimously agreed that *Runyon* should not be overruled. Justice Kennedy, writing for a 5-4 majority, held that *Runyon* should not be overruled because no special justification was shown to warrant departure from the principle of *stare decisis*, the decision had not proved unworkable, and "*Runyon* [was] entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson*, 109

(Footnote 14 continued)
pendent state law claim for intentional infliction of emotional distress. *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145-46 (4th Cir. 1986). the plaintiff also appealed the exclusion of proffered testimony by two witnesses, one in support of her harassment claim and the other in support of her promotion claim. *Id.* at 1147. Finally, the plaintiff also appealed a jury instruction which required her to prove that she was more qualified than the person promoted in order to prevail on her Section 1981 promotion claim. *Id.* The plaintiff did not appeal the jury verdict rejecting her Section 1981 discharge claim.

S.Ct. at 2371.[15] The Court then considered whether Patterson's racial harassment and failure to promote claims fell within either of the two enumerated contract rights protected by Section 1981. The Court noted that the most obvious feature of Section 1981 is that it forbids discrimination only in the making and enforcement of contracts, and that it could not be construed as a general proscription of racial discrimination in all aspects of contract relations. *Id.* at 2372.

The two enumerated contract rights protected by Section 1981 are the rights to make and enforce contracts. The first of these rights, the right to make contracts, prohibits the discriminatory refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. *Id.* at 2372. The Court held that "the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 2373. The Court noted that such postformation conduct is more naturally governed by state contract law and Title VII. *Id.* The second contract right protected by Section 1981, the right to enforce contracts, prohibits racial discrimination in the legal process which prevents individuals from enforcing their contract rights. *Id.* The right to enforce contracts covers statutory and "wholly *private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes" to enforce the terms of a contract. *Id.* (emphasis in original). The Court held that interpreting Section 1981 as protecting enumerated rights rather than as a general proscription of racial discrimination also "preserve[d] the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws." *Id.* at 2375.

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[15] Justice Brennan, concurring in the judgment in part and dissenting in part, joined by Justices Marshall and Blackmun, agreed that *Runyon v. McCrary*, 427 U.S. 160 (1976), should not be overruled, but for different reasons than the majority. Justice Brennan argued that *Runyon* should not be overruled because it was correctly decided. *See Patterson*, 109 S. Ct. at 2379-85, and because Congress effectively ratified the interpretation of Section 1981 adopted in *Runyon*. *See id.* at 2385-88.

Applying these principles to the issues raised by the plaintiff, the Court held that her racial harassment claim was not actionable under Section 1981 because it involved postformation conduct relating to the terms and conditions of continuing employment, rather than a refusal to make a contract or an impairment of her ability to enforce her established contract rights. *Id.* at 2374. In contrast, the Court held that the plaintiff's failure to promote claim was actionable if the denied promotion "rises to the level of an opportunity for a new and distinct relation between the employee and employer." *Id.* at 2377 The Supreme Court affirmed the Fourth Circuit's dismissal of Patterson's Section 1981 racial harassment claim, but vacated its judgment as it related to Patterson's discriminatory promotion claim and remanded the case for further proceedings.[16] *Id.* at 2377. The opinion does not discuss whether discharge is encompassed within the rights to make or enforce contracts.[17]

The Supreme Court's decision in *Jett v. Dallas Independent School District*, 109 S.Ct. 2702 (1989) (*Jett*), decided one week after *Patterson*, clarifies that *Patterson* did not resolve whether discriminatory discharge continues to be actionable under Section 1981. In *Jett*, the Supreme Court considered the Section 1981 and 42 U.S.C. § 1983 (1982) due process, First Amendment, and reverse discrimination claims of a white male teacher and football coach who had been

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[16] The Court held that the district court erred in requiring the plaintiff to prove she was better qualified than the individual promoted in order to establish her Section 1981 promotion claim. *Patterson*, 109 S. Ct. at 2377-79. The Court noted that establishing she was better qualified was only one of several ways that the plaintiff could prove that the employer's stated reason for its failure to promote her was pretextual.

[17] Several post-*Patterson* cases have noted that *Patterson* did not decide whether discharge actions may still be brought under Section 1981. *See e.g., Caroll v. Elliott Personnel Servs.*, 51 Fair Empl. Prac. Cas. (BNA) 1173, 1175 (D. Md. 1989); *Padilla v. United Airlines, Inc.*, 716 F. Supp. 485, 489 (D. Colo. 1989); *Bush v. Union Bank*, 1989 U.S. Dist. LEXIS 10936, *4 (W.D. Mo. September 12, 1989); *Greggs v. Hillman Distrib. Co.*, 719 F. Supp. 552, 554 (S.D. Tex. 1989); *Hall v. County of Cook*, 719 F. Supp. 721, 723 (N.D. Ill. 1989).

removed from his coaching duties, reassigned to another teaching position at a different school, and constructively discharged from his employment. *Id.* at 2708. Before addressing whether a municipality could be held liable for the Section 1981 violations of its employees under *respondeat superior*, the Court noted that at no stage of the proceedings had the school district argued that the right to make contracts did not reach the injuries suffered by the petitioner. *Id.* at 2709. Accordingly, the Court "assume[d] for purposes of these cases, without deciding, that petitioner's rights under § 1981 have been violated by his removal and reassignment." *Id.* at 2710. The Supreme Court recently reaffirmed that *Patterson* did not resolve whether discriminatory discharge is actionable under Section 1981. *See Lytle v. Household Mfg., Inc.*, 58 U.S.L.W. 4341, 4343 n.3, 4344 (O'Connor, J., concurring) (Mar. 20, 1990).

We believe the fact that the *Patterson* Court did not intend to reach the discharge question is conclusively established by the failure of that decision to make any reference, favorable or unfavorable, to the substantial body of Supreme Court Section 1981 jurisprudence developed in cases involving Section 1981 discharge claims. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (case involving discriminatory discharge claims where Supreme Court held that state statute of limitations for personal injury actions governs Section 1981 claims, and union that intentionally fails to assert discrimination claims violates Section 1981); *Saint Francis College v. Al Khazraji*, 481 U.S. 604 (1987) (discriminatory discharge case where Supreme Court held that Arab national is entitled to the protections of Section 1981 if he can show that he was subjected to intentional discrimination because of his Arab birth); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (discharge case in which Supreme Court held that the Section 1981 statute of limitations begins running on the date the allegedly discriminatory act—the denial of tenure—occurred); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 275 (1976) (employer who discharges a white employee because of his race violates Section 1981); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975) (Supreme Court cites lower court Section 1981 discharge cases to support its holding that Section 1981 affords a

federal remedy in wrongful discharge case against discrimination in private employment on the basis of race).[18] We believe that if the Supreme Court intended to call into question or overrule this substantial body of employment discrimination precedent in *Patterson*, it would have said so. We do not believe that the Supreme Court would reject by implication such seminal Section 1981 cases without so much as even a word.

We also find it significant that the majority took issue with substantial portions of Justice Brennan's opinion dissenting in part, *see Patterson*, 109 S. Ct. at 2371 n.1, 2376-77, but did not object to his statement that Section 1981 continues to provide a cause of action for discriminatory discharge. *See id.* at 2388 (in enacting Section 1981, Congress intended "to go beyond protecting the freedmen from refusals to contract for their labor *and from discriminatory decisions to discharge them*") (emphasis added) (Brennan, J., concurring in the judgment in part and dissenting in part). We also note that one of the most common uses of Section 1981 is in discriminatory discharge actions. *See generally* Eisenberg & Schwab, *The Importance of Section 1981*, 73 Cornell L. Rev. 596, 599-601 (1988) (analyzing number of Section 1981 employment discrimination claims filed in three federal district courts in fiscal year 1980-81). In light of the large number of Section 1981 discharge claims brought in the federal courts, we believe the Supreme Court would have at least expressed doubt about the continuing viability of such causes of action after *Patterson*.

It is important to note that we intend no criticism of the Supreme Court for not reaching the discharge issue in *Patterson*. The Plaintiff did not appeal the jury verdict rejecting her discharge claim, and hence this issue was not before the Court. Legal questions are best decided

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[18] In addition, prior to *Patterson* this court and virtually every other circuit had held that discriminatory discharges are covered by Section 1981. *See, e.g., Estes v. Dick Smith Ford, Inc.* 856 F.2d 1097, 1100-01 (8th Cir, 1988) (*Estes*); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1420 (7th Cir. 1986); *Connor v. Fort Gordon Bus Co.*, 761 F.2d 1495, 1498-99 (11th Cir. 1985).

in cases which present concrete controversies.[19] We simply decline, in light of *Patterson*'s uncertain scope, to apply an oblique decision to overrule the clear and undisputed precedent of this circuit.

B.

Having established that Patterson did not address whether discharge is prohibited by Section 1981, we now must decide whether discriminatory discharge is actionable under either the right to make or the right to enforce contracts. Because protection from racially motivated deprivations of contracts is essential to the full enjoyment of the right to make contracts, we hold that discriminatory discharge continues to be actionable under Section 1981.[20] Discharge is funda-

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[19] We agree with Judge Posner's eloquent discussion of the uncertain scope of *Patterson*, and the necessity of further cases to flesh out its parameters:

> We show no disrespect to the Supreme Court by suggesting that the scope of *Patterson* is uncertain.The glory of the Anglo-American system of adjudication is that general principles are tested in the crucible of concrete controversies. A court cannot be assumed to address and resolve in the case in which it first lays down a rule every controversy within the semantic reach of the rule.

Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989) (*Malhotra*) (implying but not deciding that retaliatory discharge claims continue to be actionable under Section 1981 after *Patterson*).

[20] While discharge impairs the right to *make* contracts, it does not ordinarily impair the right to *enforce* contracts as described in *Patterson*. *See* 109 S. Ct. at 2373. The discharged employee is free to simply go into court and file suit. However, when an employer retaliates against an employee by discharging her for attempting to enforce her Section 1981 rights, this very well may impair the employee's ability to enforce her contract rights within the meaning of Section 1981 because it may intimidate her into refraining from resorting to the legal process to vindicate her Section 1981 rights. *See Malhotra*, 885 F.2d at 1314 n.1 (Cudahy, J., concurring) (noting in dicta that retaliatory discharge continues to be actionable after *Patterson*); *English v. General Dev. Corp.*, 717 F. Supp. 628, 632-33 (N.D. Ill. 1989) (*Patterson* leaves retaliatory discharge action intact); *Jordan v. U.S. West Direct Co.*, 716 F. Supp. 1366, 1368-69 (D. Colo. 1989) (retaliation claims actionable after *Patterson* under right to enforce contract); *But see Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1534-35 (11th Cir. 1990); (retaliatory discharge no longer actionable under Section 1981 after *Patterson*); *Overby v. Chevron*

(Footnote 20 continued on Page 15)

mentally different from racial harassment or discrimination in the terms or conditions of employment. An employee who is harassed or subjected to discriminatory terms or conditions of employment still receives the fundamental benefit of his or her employment contract—the employment itself—even though that employment may be unpleasant, degrading, or obnoxious. In distinction, discriminatory discharge goes to the very existence and nature of the employment contract. A discriminatory discharge completely deprives the employee of his or her employment, the very essence of the right to make employment contracts.

When construing Section 1981, we are mindful of our obligation to construe a statute in a fashion which gives meaningful effect to the rights it confers, not to negate them. *McCown v. Heidler*, 527 F.2d 204, 207 (10th Cir. 1975). In fact, we are required to generously interpret the Civil Rights Act of 1866, from which Section 1981 is derived, " 'accord[ing] it a sweep as broad as its language.' " *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (*Jones*) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).[21] We refuse to construe Section

(Footnote 20 continued)
USA, Inc., 884 F.2d 470, 472-73 (9th Cir. 1989) (same); *Alexander v. N.Y. Medical College*, 721 F. Supp. 587, 588 (S.D.N.Y. 1989) (same); *Williams v. National R.R. Passenger Corp.*, 716 F. Supp. 49, 51-52 (D.D.C. 1989) (retaliation not actionable under Section 1981 because right to enforce contracts unimpeded); *Dangerfield v. Mission Press*, 50 Fair Empl. Prac. Cas. (BNA) 1171, 1172 (N.D. Ill. 1989) (same). *Cf. Fowler v. McCrory Corp.*, No. JFM-87-1610 (D.Md. Dec. 22, 1989) (white employee discharged after filing complaint with local agency claiming that employer directed him not to hire all blacks has a cause of action under Section 1981 for violation of his own right to "give evidence," and has third-party standing to assert a violation of blacks' Section 1981 right to make contracts).

[21] Recognizing the extent and urgency of the crisis in which the Reconstruction civil rights statutes were promulgated, the Supreme Court has extended its policy of broad interpretation to other Reconstruction Era civil rights statutes as well. *See Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (interpreting 42 U.S. C. §1985 (3) (1982)); *Price*, 383 U.S. at 801 (interpreting 18 U.S.C. §241 (1988)). *See also Triad Assocs., Inc. v. Chicago Hous. Auth.*, Nos. 88-1353, 88-2830, and 88-2876, slip op. at 19-21 (7th Cir. Dec. 26, 1989) (noting broad construction rule, court interprets 42 U.S.C. § 1985(3) to cover civil conspiracies motivated by racial animus towards whites).

1981 as prohibiting an employer from refusing to hire someone based on her race, but then permitting the discharge of that same employee because of her race a month or a year later. Such an absurd interpretation would allow discriminatory discharge to effectively annihilate the right to make contracts. The right to make contracts would be rendered virtually meaningless unless it encompasses the right to be free from discriminatory deprivations of such contracts. In order to give meaning to the right to make contracts free from discrimination, the right to be free from discriminatory discharge must be implied. *See Luria v. United States*, 231 U.S. 9, 24 (1913) (that which is clearly implied in a statute is as much a part of the law as what is expressed).[22] Accordingly, we hold that discriminatory discharge directly affects the right to make contracts, and therefore is cognizable under Section 1981.[23]

We believe that construing the right to make contracts as encompassing the right to be free from discriminatory discharge does not unduly strain the language of Section 1981. *See Patterson*, 109 S.Ct. at 2377. We do not deny that the right to make contracts is reasonably susceptible to an interpretation which does not extend its protection to

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[22] *See also Malhotra*, 885 F.2d at 1314 (7th Cir. 1989) (Cudahy, J., concurring) (A prohibition against retaliation is a "necessary adjunct" to Section1981 because "[i]f an employee may be fired for complaining of discrimination, his [or her] right not to be discriminated against is surely vitiated").

[23] We find the dissent noteworthy not for the issues it resolves, but for the questions it raises and leaves unanswered. For instance, the dissent suggests that we have applied a different standard in analyzing Hicks' claim than the Supreme Court applied in *Patterson*, *post* at 53, but fails to explain with particularity in what respect we have departed from *Patterson*. Moreover, although the dissent concedes that *Patterson* did not address whether discharge is actionable under Section 1981, *post* at 53, it nevertheless purports to resolve the discharge issue by quoting the *Patterson* holding on harassment, substituting "harassment" with the words "discriminatory discharge" in parentheses. *Post* at 54. We agree that *Patterson* held that racial harassment is not actionable under Section 1981. However, we do not believe that merely inserting "discriminatory discharge" into the Supreme Court's holding on harassment sheds light on the question of whether discriminatory discharge is prohibited by the rights to make and enforce contracts.

prohibit discrimination after the contract has been formed.[24] Nonetheless, in our view, postformation discharge continues to be actionable under the right to make contracts when it totally deprives the

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[24] We recognize that a number of federal courts have found, often summarily, that discharge is not longer actionable under Section 1981 after *Patterson*. *See, e.g., Rivera v. A.T. & T. Information Sys., Inc.*, 719 F. Supp. 962, 964-65 (D. Colo. 1989); *Hall v. County of Cook, Illinois*, 719 F. Supp. 721, 723-24 (N.D. Ill. 1989); *Crader v. Concordia College*, 724 F. Supp. 558, 562 (N.D. Ill. 1989); *Alvarez v. Norden Systems, Inc.*, 1989 U.S. Dist. LEXIS 9954, at 15 (S.D.N.Y. August 24, 1989); *Bush v. Union Bank*, 1989 U.S. Dist. LEXIS 10936, at 2-4 (W.D.Mo. 1989); *Copperidge v. Terminal Freight Handling Co.*, 50 Fair Empl. Prac. Cas. (BN) 812 (W.D. Tenn. 1989); *Greggs v. HIllman Distributing Co.*, 719 F. Supp. 552 (S.D. Tex. 1989); *Leonig v. Hilton Hotels*, 50 Fair Empl. Prac. Cas. (BNA) 738 (D.D.C. 1989). *Cf. Carroll v. General Accident Ins. Co.*, 891 F.2d 1174, 1175 (5th Cir. 1990) (without discussing discharge issue, court relies on *Patterson* harassment holding to reverse portions of jury verdict based solely on Section 1981 in case where plaintiff had claimed racial harassment culminating in constructive discharge).

These courts have generally reasoned that discriminatory discharge is postformation conduct under *Patterson* and therefore no longer actionable under Section 1981. However, none of these decisions discuss the fundamental differences between discharge and conduct relating to the conditions of employment. Many of these cases fail to seriously consider the implications of *Patterson*'s failure to resolve the discharge issue. These decisions also do not consider the obligation of the courts to give meaningful protection to the right to make contracts, and the absurdity that would result if the employer must be nondiscriminatory in hiring but can then fire with impunity. Finally, none of these decisions consider the legislative history of the 1866 Act or Congress' desire to secure to the freedmen the full exercise of the right to make contracts regardless of the devices employed by opponents to avoid compliance. Because these factors were not adequately considered by the courts finding Section 1981 discharge actions precluded, we are not persuaded by them.

We also note that several courts have agreed with our conclusion that discriminatory discharge continues to be actionable under Section 1981 after *Patterson*. *See, e.g., Padilla v. United Airlines*, 716 F. Supp. 485, 490 (D.Colo. 1989) (discriminatory discharge directly affects the right to make a contract contrary to Section 1981); *Carroll v. Elliott Personnel Servs.*, 51 Fair Empl. Prac. Cas. 1173 (BNA) (D. Md. 1989); *Birdwhistle v. Kansas Power & Light*, 723 F. Supp. 570, 575 (D. Kan. 1989) (discharge directly related to contact enforcement and is still actionable after *Patterson*); *Booth v. Terminix Int'l, Inc.*, 722 F. Supp. 675 (D. Kan. 1989); *Gamboa v. Washington*, 716 F. Supp. 353 (N.D. Ill. 1989) (constructive discharge).

victim of the fundamental benefit the right to make contracts was intended to secure—the contractual relationship itself. Indeed, the *Patterson* Court indicated that it is appropriate to examine postformation conduct in certain circumstances to determine whether the right to make contracts has been violated. *See* 109 S. Ct. at 2376-77.

Nor will permitting Section 1981 actions for discriminatory discharge subvert Title VII's preference for mediation and conciliation. *See id.* at 2374-75. After an employee is discharged, the employment relationship is severed. At this point, there is no relationship to salvage. The absence of an employment relationship makes discharge equivalent to a refusal to contract. *Patterson* notes that a refusal to enter a contract on the basis of race would continue to be actionable under Section 1981 and Title VII, *id.* at 2375, but the Court was not troubled by the overlap because the interest in preserving the integrity of Title VII procedures is lessened considerably when an employment relationship does not exist. The Court held that "[a]t this stage of the employee/employer relationship Title VII's mediation and conciliation procedure would be of minimal effect, for there is not yet a relation to salvage." *Id.* Similarly, allowing an employee to challenge his or her discriminatory discharge under either Section 1981 or Title VII will not undermine Title VII's mediation and conciliation procedures, because there is no longer an employment relationship to salvage.[25]

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[25] By noting that our holding does not undermine Title VII's preference for mediation and conciliation, we do not mean to suggest that the scope of Section 1981 should vary depending on whether a parallel statutory scheme such as Title VII exists. Section 1981 prohibits discrimination in the making and enforcement of contracts generally. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976) (Section 1981 prohibits a private school from refusing to contract with black students because of their race); *Tillman v. Wheaton-Haven Recreational Ass'n*, 410 U.S. 431 (1973) (Section 1981 prohibits a community recreational association from denying membership based on race). *See also Patterson*, 109 S. Ct. at 2390 ("Section 1981 is a statute of general application, extending not just to employment contracts but to *all* contracts") (emphasis in original) (Brennan, J., concurring in the judgment in part and dissenting in part). Moreover, Section 1981 is not limited to discrimination in businesses with 15 or more employees, *cf.* 42 U.S.C. § 2000e(b) (Title VII applies to "person[s] engaged in an industry affecting

(Footnote 25 continued on Page 19)

Our holding that discharge continues to be actionable under Section 1981 also fulfills our obligation to interpret Section 1981 and 42 U.S.C. § 1982[26] (1982) (Section 1982) coextensively. Both Sections 1981 and 1982 are derived from Section 1 of the Civil Rights Act of 1866.[27] *See General Building Contractors Assoc. v. Pennsylvania*, 458 U.S. 375, 384 (1982); *Runyon*, 427 U.S. at 170; *Jones*, 392 U.S. at 408. Because of their common origin, the Supreme Court has held that where possible, the two sections should be given a common interpretation, *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439 (1973), and in fact the Court consistently has given the sections

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(Footnote 25 continued)
commerce who has fifteen or more employees . . . "), and hence may protect the approximately 15% of the workforce not covered by Title VII. *Id.* We refer to Title VII only to demonstrate that in discharge cases such as this, where the coverages of Title VII and Section 1981 do overlap, the mediation and conciliation procedures of Title VII are not undermined by allowing Section 1981 actions because an employment relationship no longer exists.

[26] 42 U.S.C. § 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[27] Section 1 of the Civil Rights Act of 1866 provided as follows:

> Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, *shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties as to none other*, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act of April 9, 1866, C. 31, § 1, 14 Stat. 27 (emphasis added to text currently codified at Section 1981 and 1982).

consistent interpretations, *see id.* at 440; *Runyon*, 427 U.S. at 170-73; *Shaare Tefile Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (same definition of race governs Section 1981 and 1982 actions). In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236-37 (1969) (*Sullivan*), the Supreme Court held that Section 1982 was violated when a white property owner was deprived of his property for advocating the rights of a black tenant. The *Sullivan* Court thus found that Section 1982 protects the right to acquire property *and* the right to keep it. By construing Section 1981 to include the right to keep a job as well as the right to acquire one, we effectuate the rule favoring consistent interpretations of Sections 1981 and 1982.

Moreover, our holding that discharge continues to be actionable under Section 1981 is in consonance with the unwavering commitment of all three branches of the federal government to the eradication of racial discrimination,[28] and the special obligation of the federal courts to protect civil rights.[29] Absent clear direction from the Supreme Court,

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[28] *See, e.g., Patterson*, 109 S. Ct. at 2371 ("*Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin"), *id.* at 2379 ("The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimensions. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere"), *id.* at 2380 (Brennan, J., concurring in part in the judgment and dissenting in part) (commitment to eradicate discrimination the "product of a national consensus that racial discrimination is incompatible with our best conception of our communal life, and with each individual's rightful expectation that her full participation in the community will not be contingent upon her race"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) ("every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination"); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 66 (1975) ("[p]lainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority").

[29] *See, e.g., Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Ex parte Virginia*, 100 U.S. 339, 346 (1880). *See generally* Belknap, *Federalism and the Protection of Civil Rights*, 86 Colum. L. Rev. 1741 (1986); Chambers, *Protection of Civil Rights: A Constitutional Mandate for the Federal Government*, 87 Mich. L. Rev. 1599 (1989).

we will not infer that discharge from employment, the most severe employment injury of all, is no longer cognizable under Section 1981.[30]

C.

The legislative history of the Civil Rights Act of 1866 (1866 Act) supports our conclusion that Section 1981 prohibits discharges based on race.[31] We will consider the context within which the 1866 Act was

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[30] Our holding that discriminatory discharge is prohibited by Section 1981 also furthers the deterrent purposes of Section 1981. *See Edwards v. Jewish Hosp.*, 855 F.2d 1345, 1351 (8th Cir. 1988) (*Edwards*) (acknowledging deterrent objectives of Section 1981 in employment relationships is particularly important because of the debilitating chain reaction that racially motivated discharge from employment may trigger. *See id.* at 1349 ("racial discrimination takes its most malevolent form when it occurs in employment, for prejudice here not only has an immediate economic effect, it has a fulminating integrant that perpetrates the pestilences of degraded housing, unsatisfactory neighborhood amenities, and unequal education") (citation omitted).

[31] Because the meaning of the right to make contracts as formulated in the *Patterson* opinion is ambiguous as to whether it encompasses discharge, it is appropriate to turn to the legislative history of Section 1981 to ascertain whether it sheds light on the problem. *See Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2566 (1989) ("[w]here the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope") (quoting *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1984 (1989).

Our resort to legislative history is further supported by the fact that the Supreme Court has consistently interpreted both Sections 1981 and 1982 with reference to legislative history. *See, e.g., Jett v. Dallas Indep. School Dist.*, 109 S.Ct. 2702, 2711-15 (1989) (post-*Patterson* case in which Supreme Court considers legislative history of Section 1981 at length to determine whether 39th Congress intended to create a cause of action for damages against municipal actors and others who violated the rights now enumerated in Section 1981); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 612-13 (1987) (*Al-Khazraji*) (discusses statements by members of Congress regarding their understanding of "race" to ascertain whether Arab national is entitled to the protections of Section 1981); *Shaare Tefile Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (based on legislative history developed in *Al-Khazraji*, Court holds that Jews were viewed as a distinct race at the time the Civil Rights Act of 1866 was passed, and thus entitled to protections of Section

(Footnote 31 continued on Page 22)

passed, the evidence before Congress at the time it considered the Act, and the Congressional debates themselves.[32]

Before considering the question of whether racially motivated discharges fall within the scope of the 1866 Act as envisioned by the 39th Congress, it is important to take note of the context in which this Act was proposed, debated and passed.[33] The radical and fundamental changes occasioned by the Civil War and the abolition of slavery are well-documented elsewhere and need not be recounted at great length

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(Footnote 31 continued)
1982); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287-95 (1976) (Court relies on legislative history to determine that whites are entitled to protections of Section 1981); *Runyon*, 427 U.S. at 168 n.8 (discusses legislative history of Civil Rights Act of 1866 to determine significance of its reenactment in 1870 and codification in 1874); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 435 (1973) (construction of Section 1982 developed from "a detailed review of the legislative history"); *Jones*, 392 U.S. at 422-37 (detailed review of legislative history to determine what types of discrimination Section 1982 was intended to prevent). *See generally* Note, *The Supreme Court, 1988 Term: Leading Cases*, 103 Harv. L. Rev. 137, 336-37 & n.47 (1989).

[32] We are wary of reading too much into legislative history, but believe that the legislative history of the 1866 Act is sufficiently compelling to illuminate and buttress our interpretation of Section 1981. *See* Sullivan, *Historical Reconstruction, Reconstruction History and the Proper Scope of Section 1981*, 98 Yale L.J. 541, 542 (1989) (*Historical Reconstruction*) ("most matters of historical interpretation necessarily involve probabilities, not certainties").

[33] *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386 (1982) (when interpreting Section 1981, one "must be mindful of the events and passions of the time in which the law was formed") (citation omitted); *United States v. Price*, 383 U.S. 787, 804 (1966) ("The purpose and scope of the 1866 and 1870 enactments must be viewed against the events and passions of the time").

Historians have cautioned on the dangers inherent in citing isolated quotations from Reconstruction Era congressional debates without understanding the conditions Congress faced and the ideological beliefs of the Republican majorities in Congress. *See* E. Foner, Reconstruction: America's Unfinished Revolution, 1863-77, at 257 n.53 (1988) (Reconstruction).

here.[34] Suffice it to state that this country had just suffered through the Civil War, a terrible conflict which cost the most lives of any war in American history. The Civil War was unique because it did not present an external enemy, but divided the country, pitting two competing economic systems and ways of life against one another, each vying for dominance. What began as a war to preserve the Union was gradually transformed into a war to abolish slavery and inequality based on race. *See* Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 Yale L.J. 541, 548-49 (1989) (*Historical Reconstruction*) Despite the northern victory, public and private efforts to continue the subjugation and degradation of the freed slaves were rampant in the South.

The thirteenth amendment was ratified on December 6, 1865.[35] Despite the ratification of the amendment, many members of Congress believed that broader and more explicit statutory guarantees were necessary if the newly freed slaves were to have "more than parchment rights." J. tenBroek, Equal Under Law, at 175 (1965). In early 1866, the 39th Congress was well aware of the ubiquitous public and private

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[34] For discussions of the changes wrought by the Civil War and the increase in the scope of federal authority which resulted, see Reconstruction, at 228-80; J. McPherson, Battle Cry of Freedom: The Civil War Era, at 859-62 (1988); R. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876, at 1 (1985) ("Between the years 1866 and 1873, a legal theory of national civil rights enforcement authority emerged in the courts of the United States that manifested a revolutionary impact of the Civil War upon the constitutional and legal structure of American federalism."); *Historical Reconstruction*, 98 Yale L.J. at 547-56, 561-64; Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 874-84 (1986) (*Revolutionary Constitutionalism*).

[35] The thirteenth amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

discrimination against the freedmen in the South.[36] Many Republicans believed that such discrimination threatened to make a mockery of the thirteenth amendment, if not actually precipitate a return to slavery. *See Historical Reconstruction*, 98 Yale L.J. at 548. Many northerners had come to the uneasy conviction "that somehow the South had never really surrendered after all." *See* Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 871 (1986) (*Revolutionary Constitutionalism*). As a result, some in Congress came to believe that the enactment of legislation protecting the freedmen was necessary in order to codify into law the military resolution of the Civil War. *Id.* A major focal point of the conflict between the Republican Congress and the South concerned the establishment of a free labor contract system to replace slavery. On the one hand, many northerners and black leaders saw a vigorous free labor contract system as a key to practical freedom. They believed that the free labor contract would be a substitute for slavery and constitute the backbone of a totally new system. *See Historical Reconstruction*, 98 Yale L.J. at 549-50, 556. White southerners, on the other hand, "bitterly resisted the creation of a free labor market as implied by emancipation." E. Foner, Reconstruction: American's Unfinished Revolution, 1863-77, at 132 (1988) (Reconstruction) (citation omitted). Southerners insisted that "[f]ree labor assumptions — economic rationality, internal self-discipline, responsiveness to the incentives of the market — could never . . . be applied to blacks." *Id.* White planters recognized that the free labor contract would seal the demise of the plantation labor system, and bitterly resisted its implementation. In sum, the 39th Congress debated and passed the 1866 Act within a context characterized by the end of he Civil War, northern fear and

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[36] *See Jones*, 392 U.S. at 427 (" 'Accounts in newspapers North and South, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced' to show that 'private outrage and atrocity' were 'daily inflicted on freedmen . . .' ") (quoting J. tenBroek, Equal Under Law, at 181 (1965)).

anger over deprivations of freedmen rights in the South, and southern resistance the implementation of the free labor contract system.[37]

At the time it considered the 1866 Act, the 39th Congress had before it substantial evidence documenting widespread denials of the freedmen's right to enjoy the meaningful benefits of contract. The debate over the 1866 Act effectively began with Congress' receipt of a report by Major General Carl Schurz on conditions in the South. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) (Schurz Report). *See Jones*, 392 U.S. at 428-429; *Historical Reconstruction*, 98 Yale L.J. at 553. In addition to documenting the emergence of the Black Codes, the Schurz Report detailed the various private devices used to deny the freedmen their rights. *See e.g.*, Schurz Report at 17-20 (persecution and violence against freedmen), 21-22 ("General Ideas And Schemes Of Whites Concerning The Freedmen"). The Schurz report noted that even if all discriminatory statutes and orders were repealed, equal treatment would still not be secured. *Jones*, 392 U.S. at 429. Schurz was careful to note that the denial of equal treatment was particularly common in contract relations.

The Schurz Report placed substantial emphasis on southern resistance to the "new order of things" — the replacement of slave labor with the free labor contract system. *See, e.g., id.* at 16-19, 21-22, 37-40. Schurz observed that the vast majority of southern whites believed

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[37] The importance of the free labor contract for reordering southern society, and the resistance its introduction engendered, has been succinctly described as follows:

> [Republican] leaders recognized that the abolition of slavery, having destroyed the labor system that had existed for two centuries in the Southern states, necessarily called for the creation of a new labor system, for "the formation of new civil arrangement." . . . Southern whites likewise conceived of the labor question as the driving issue of public policy . . . Former masters were neither prepared nor disposed to deal with former slaves on the grounds assumed by free labor ideology. They struggled to recreate the discipline and control of a slave system, while the Freedmen struggled to discover freedom as independent workers.

Historical Reconstruction, 98 Yale L.J. at 549 (citation omitted).

that blacks simply would not work without physical compulsion, *id.* at 16[38], and that only a small minority of southern whites were attempting to adopt to the new contract labor system. *Id.* at 38. Schurz warned that southern employers were attempting to "[a]dhere, as to the treatment of laborers, as much as possible to the traditions of the old system, even where the relations between employers and laborers had been fixed by contract." *Id.* at 19.

Significantly, Schurz reported that former masters generally did not refuse to contract with their former slaves, but instead undermined the establishment of the free labor system by refusing to pay wages earned or by trying to reintroduce practical slavery through the imposition of onerous contract terms. *See id.* at 22 ("many ingenious [southern] heads set about to solve the problem, how to make free labor compulsory"); *Historical Reconstruction*, 98 Yale L.J. at 553-54. Many southerners impeded the introduction of the contract system by "throw[ing] obstacles in its way," *id.* at 39, or by "adulter[ating] the new order of things by the admixture of elements belonging to the system of slavery." *Id.* at 40.

Schurz cogently summarized the problem facing the 39th Congress as follows:

> The true nature of the difficulties of the situation is this: The general government of the republic has, by proclaiming the emancipation of the slaves, commenced a great social revolution in the South, but has, as yet, not completed it. Only the negative part of it is accomplished. The slaves are emancipated in point of form but free labor has not yet been put in the place of slavery in point of fact.

Schurz Report at 38. In fact, Schurz was so concerned over southern resistance to the implementation of the free labor contract system that

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[38] *See also* Reconstruction, at 198 ("The ferment in the countryside, the history of other societies which had experienced emancipation, and ideologies and prejudices inherited from slavery, combined to convince the white South that only through some form of coerced labor could the production of plantation staples be resumed.").

one of his key recommendations was to extend the time period of federal control over the southern states (and postpone their readmission into the Union) until the free labor contract system was firmly established. *See id.* at 39 ("The facts enumerated in this report, as well as the news we receive from the [S]outh from day to day, must make it evident to every unbiased observer that unadulterated free labor cannot be had at present, unless the national government holds its protective and controlling hand over it.").

The 39th Congress also considered the report of Major General Oliver O. Howard, the head of the Freedmen's Bureau. H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. (1866) (Howard Report). The Howard Report detailed the widespread use of corporal punishment, the fraudulent deprivation of freedmen's wages, the formation of combinations to extort the freedmen, and the general refusal of whites to fulfill their contracts with freedmen. *See* Howard Report at 25, 28, 30, 32. Howard believed that the southerner's reluctance to embrace the contract labor system arose from "the prejudice of the employer, and want of practical knowledge of any other system than the one under which he has been brought up . . ." *Id.* at 32. Howard also documented the important role of the Freedmen's Bureau in implementing the free labor system by exhorting parties to fulfill their contracts and resolving disputes when they arose. *See id.* at 32-35. Like Major General Schurz, Major General Howard focused on practical resistance to the implementation of the contract system through the devices of private parties. *See Historical Reconstruction*, 98 Yale L.J. at 554.

The Joint Committee of Fifteen on Reconstruction (Joint Committee) conducted hearings to examine conditions in the southern states contemporaneously with Congress' consideration of the 1866 Act. Testimony before the Joint Committee established that although "[f]ormer masters generally were willing to go through the motions of 'contracting' with the Freedmen for their labor," the emancipated slaves did not receive the true benefits of the contract labor system because of the discriminatory imposition of low wages and onerous working conditions. Because former masters balked at paying fair wages, "there was no possibility that the freedmen would be able to

contract *meaningfully* to sell their labor." *Id.* at 555 n.95 (citing congressional testimony) (emphasis added).

Congress debated and passed the 1866 Act against this substantial evidence of resistance to the creation of an "unadulterated" contract labor system. The evidence before Congress documented that the emancipated slaves were not generally denied the right to enter into contractual relationships *per se*, but instead were denied the meaningful rights and benefits attendant to bona fide contractual relationships. Congress was therefore aware that the right to make and enforce contracts needed to be fully protected in order to insure the replacement of slavery with a free labor system.

We believe the rights "to make and enforce contracts" must be interpreted in reference to the abuses Congress had knowledge of and intended to address. The rights conferred in Section 1981 come "freighted with the meaning imparted to them *by the mischief to be remedied and by contemporaneous discussion.* In such conditions history is a teacher that is not to be ignored." *Duparquet Co. v. Evans*, 297 U.S. 216, 221 (1936) (Cardozo, J.) (emphasis added) (citation omitted). The 1866 Act was intended to effectively respond to the abuses Congress specified. Its means were commensurate with the evils perceived. *See Historical Reconstruction*, 98 Yale L.J. at 547.

The debates themselves also demonstrate Congress' intention to accord meaningful protection to the rights enumerated in the 1866 Act. On January 5, 1886, less than one month after the ratification of the thirteenth amendment, Senator Trumbull of Illinois introduced Senate Bill 61, which eventually became the Civil Rights Act of 1866. Senator Trumbull described the need for the 1866 Act when introducing it to the Senate:

> Mr. President, I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very

> little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.

Cong. Globe, 39th Cong., 1st Sess. 474 (1866). According to Senator Trumbull, the purpose of the 1866 Act was to "break down all discrimination between black men and white men." *Id.* at 599.

Both supporters and opponents of the 1866 Act understood the broad scope of the rights it secured.[39] According to its sponsor, Senator Trumbull, the Act would affirmatively secure those "fundamental rights belonging to every man as a free man," including the right to make and enforce contracts. *Id.* at 476. The rights specified in the 1866 Act were those thought to be essential to life, liberty, and property. *See Revolutionary Constitutionalism*, 61 N.Y.U.L. Rev. at 924-25. Indeed, much of the congressional debate centered on the broad language of the act. *See* Note, *When Is Race Not A Race?: Contemporary Issues Under the Civil Rights Act of 1866*, 61 N.Y.U.L. Rev. 976, 982 (1986).

Like the other rights enumerated in the 1866 Act, Congress intended to accord full protection to the rights to make and enforce contracts. Although there is no explicit discussion about whether the rights to make and enforce contracts prohibit discriminatory discharge, it is clear that Congress wanted to assure the economic independence of freedmen by protecting their rights to acquire *and* keep a job:

> [The 1866 Act] merely provides safeguards to shield [the freedmen] from wrong and outrage, and to protect them in the enjoyment of that lowest right of human nature, the right to exist. Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, *and the means of holding and enjoying the proceeds of their toil.* Who can deny them this?

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[39] *See Jones*, 392 U.S. at 433 ("That the bill would indeed have so sweeping an effect was seen as its great virtue by its friends and as its greatest danger by its enemies but was disputed by none.").

Cong. Globe, 39th Cong., 1st Sess. 1159 (remarks of Representative Windom) (emphasis added). Moreover, Congress was not concerned with protecting the right to make contracts in the abstract; the intention was to protect the freedmen's right to enjoy the rewards of their labor free from discrimination:

> It is idle to say that a citizen shall have the right to life, *yet to deny him the right to labor*, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract *to secure the privilege and the rewards of labor.*

Cong. Globe, 39th Cong., 1st Sess. 1833 (remarks of Representative Lawrence) (emphasis added). In our view, a person who is discharged because of his or her race is denied the right to labor and secure its benefits in the same way that a person who is not hired because of race is denied this right. When Congress protected the rights to make and enforce contracts, it intended to protect the right to contract *and* the right to receive the benefits of contract.

The legislative debates are also replete with references to the fact that the 1866 Act was necessary in order to give real meaning to the thirteenth amendment. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (remarks of Senator Trumbull) ("This measure is intended to give effect to [the thirteenth amendment] and secure to all persons within the United States practical freedom."); *id.* at 1151 (remarks of Representative Thayer) (1866 Act necessary to avoid rendering the thirteenth amendment "a mere paper guarantee"). *See also Jones*, 392 U.S. at 433 ("like the Senate, the House was moved by a larger objective [when passing the 1866 Act] — that of giving real content to the freedom guaranteed by the Thirteenth Amendment"). A majority in Congress believed that section two of the amendment gave it authority to enact positive legislation to remove the badges and

incidents of slavery.[40] Section two of the thirteenth amendment " 'clothe[d] Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*' " *Jones*, 392 U.S. at 439 (emphasis in *Jones*) (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1873)).[41] We believe that discharge based on race, like the refusal to contract, would have been viewed as another form of resistance to the creation of a true free labor system, and was one of the "badges and incidents" of slavery that Congress intended to eradicate when prohibiting discrimination in the making and enforcement of contracts.

The Senate passed the 1866 Act by a 33-12 vote on February 2, 1866, less than a month after Senator Trumbull introduced it. The House passed the measure on March 13, 1866 by a margin of 111 to 38, with 34 not voting. On March 27, 1866, President Andrew Johnson vetoed the Act. Similarly large majorities overrode the President's veto, and on April 9, 1866 the 1866 Act became law.[42] Congress de-

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[40] *See, e.g.*, Globe, 39th Cong., 1st Sess. 322 (remarks of Senator Trumbull) ("I have no doubt that under [Section two] . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing"); *id.* at 1151 (remarks of Representative Thayer) ("when I voted for the second section of the [thirteenth amendment, I felt certain] . . . that I had given to Congress ability to protect . . . the rights which the first section gave . . ."); *id.* at 503 (remarks of Senator Howard) (Section two of the thirteenth amendment gave Congress the authority to enact positive legislation to combat the resistance of slaveholders to the "loss of their property").

[41] *See also Edwards*, 855 F.2d 1345, 1347 (8th Cir. 1988) (pursuant to section two of the thirteenth amendment, Congress has power to rationally determine what are the badges and incidents of slavery and to translate that determination into effective legislation) (citations omitted).

[42] The 39th Congress' override of President Johnson's veto of the Civil Rights Act of 1866 was the first time Congress had ever overridden the President on a major political issue. Many in Congress took satisfaction in the fact that the override was in favor of a statute guaranteeing equal rights for all, rather than in a dispute over an economic issue such as the imposition of a tariff. *See Jones*, 392 U.S. at 435 n.70.

bated and passed the 1866 Act with full consciousness of the unprecedented rights it conferred and the dramatic expansion of federal authority it entailed. Despite its far-reaching scope, the 1866 Act was seen as a necessary response to the crisis precipitated by the Civil War, emancipation, and post-war southern resistance. Senator Morrill expressed the sentiment of many when he remarked, "I admit that this species of legislation is absolutely revolutionary. But are we not in the midst of a revolution?" Cong. Glove, 39th Cong., 1st Sess. 570.[43]

This review of the context of the debate, the evidence before Congress, and the debates themselves is instructive in two key respects. First, the replacement of slavery with the free labor contract system was a cornerstone of northern reconstruction policy. The free contract system was seen as essential to the radical reordering of southern society. Secondly, Congress was quite conscious of the multitude of devices used to deny the freedmen the meaningful exercise of their rights, including their rights to make and enforce contracts. Congress therefore passed an intentionally broad act, in order to insure the former slaves the meaningful exercise of their rights in the face of manifold southern resistance.

Given Congress' acquaintance with and concern about the varied forms of southern intransigence, we doubt that it would have subscribed to an interpretation of Section 1981 that secures the equal right of the freedmen to make contracts at the formation stage, but then abandons them after the contract is formed. Congress could not have been so naive as to believe that nothing more needed to be done other than to secure the right to enter into contracts. We do not believe that Congress would have countenanced an interpretation of the 1866 Act which made it susceptible to such easy subversion. This could not have been the intended fate of the 1866 Act, which was designed to secure "freedom in fact." Cong. Globe, 39th Cong., 1st Sess. 476 (remarks of

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[43] *See* Cong. Globe, 39th Cong., 1st Sess. 1151-55 (remarks by Representative Thayer describing the Thirteenth Amendment as a "revolutionary measure" and the 1866 Act as necessary "to carry to its legitimate and just result the great humane revolution to which I have referred"). *See also Historical Reconstruction*, 98 Yale L.J. at 546-47 & n.38.

Senator Trumbull). Because of the importance of the free labor contract to the envisioned transformation of the South and the evidence of resistance to its implementation that Congress considered, we believe that Congress could have only intended that the 1866 Act be interpreted to secure the *meaningful* exercise of the rights to make and enforce contracts. The historical context, evidence before Congress, and legislative history of the 1866 Act thus buttress our conclusion that the right to make contracts forbids discriminatory discharge.

For the reasons discussed above, we hold that discriminatory discharge continues to be cognizable under Section 1981, and Brown Group's argument that *Patterson* precludes actions for discriminatory discharge is rejected.[44]

III. Sufficiency of the Evidence

Brown Group next argues that the district court erred in denying its motion for a JNOV because the jury's finding of discrimination was clearly erroneous and not supported by sufficient evidence. We review the district court's denial of a motion for a JNOV under the well-settled standards set forth in *McGee v. South Pemiscot School District R-V*:

> Both the trial court and this Court must (a) consider the evidence in light most favorable to the prevailing party, (b) assume that the jury resolved all conflicts of evidence in favor of that party, (c) assume as true all facts which that party's evidence tended to prove, (d) give that party the benefit of all favorable inferences which may reasonably be drawn from proved facts, and (e) deny the motion if in light of the above reasonable jurors could differ as to the conclusions that could be drawn from the evidence.

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[44] Because we hold that discriminatory discharge is actionable under Section 1981, we need not address whether *Patterson* should be retroactively applied to Hicks' case. *Compare Hall v. County of Cook*, 719 F. Supp. 721, 725 n.3 (N.D. Ill. 1989) (*Patterson* decision retroactively applied to dismiss plaintiff's Section 1981 discharge claim) *with Gillespie v. First Interstate Bank of Wisconsin Southeast*, 717 F. Supp. 649, 651 n.2 (E.D. Wis. 1989) (*Patterson* decision not retroactively applied to reverse jury award based on Section 1981 harassment and discharge claims).

712 F.2d 339, 343 (8th Cir. 1983) (*McGee*). Applying these principles to the jury's finding of intentional discrimination, we hold that the district court did not err in denying Brown Group's motion for a JNOV.[45]

Viewing the evidence in the light most favorable to Hicks, it is clear that at a minimum, the jurors could differ as to the conclusions that could be drawn from the evidence. Brown Group maintains that Hicks was terminated because Chester had more experience on the raw materials dock and was better qualified to handle the job. Rich Williams testified that he also based his decision on the fact that he believed Hicks was an emotional supervisor who would wave his

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[45] We disagree with Brown Group's contention that because this is a reverse race discrimination case, Hicks was required to prove the existence of "background circumstances support[ing] the suspicion that defendant is the unusual employer who discriminates against the majority." *Lanphear v. Prokop*, 703 F.2d 1311, 1314-15 (D.C. Cir. 1986) (*Lanphear*) (citation omitted). *See also Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C. Cir. 1986) (*Bishopp*). We need not decide the impact of *Lanphear* and *Bishopp* because they both address whether or not a member of the majority race has come forward with sufficient evidence to make out a *prima facie case* of race discrimination. In this case, after hearing all of the evidence, the jury found that Brown Group discriminated against Hicks because of his race. We do not review the evidence to determine whether or not Hicks made out a prima facie case. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (after all the evidence is before the court, the factfinder must decide if the defendant intentionally discriminated against the plaintiff, and whether the plaintiff has made out a prima facie case "is no longer relevant"); *Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 469 (8th Cir. 1989) (*Tolan*) (On appeal from a finding of discrimination, "this court does not review the evidence presented by the parties at any given stage of the proceedings. Instead, we must review the record to determine whether the evidence supports the jury's ultimate finding of . . . discrimination."); *Estes*, 856 F.2d at 1100 (8th Cir. 1988) (court rejects defendant's "case-within-a-case" contention that plaintiff must prove the sufficiency of his or her prima facie case before the sufficiency of proof regarding defendant's intent can be addressed). We need only decide whether, viewing the evidence in the light most favorable to Hicks, reasonable jurors could find that Brown Group discriminated against Hicks. *See id.*; *McGee v. South Pemiscot School Dist. R-V*, 712 F.2d 339, 343 (8th Cir. 1983) (*McGee*). We express no opinion on the elements of a prima facie reverse race discrimination case.

hands and verbally abuse his subordinates. Williams also testified that Hicks had told him he was not happy about relocating to the Benton terminal or being forced to accept a pay cut.[46] Brown Group claims that Hicks did not contradict this explanation or show that it was pretextual. We disagree. While it is true that Hicks did not challenge Chester's general qualifications, Hicks did present evidence challenging Williams' assessment of his qualifications for the job. In the last written performance evaluation received by Hicks, the grade he received from Williams for acceptability as a company representative in plant and community was "[e]xcellent, exceeds job requirements, highly commendable, creative thinker." Williams conceded that he knew nothing about Hicks' and Chester's performance at the Chouteau Avenue warehouse, where they had worked for over two years before their 1982 transfers to the Benton terminal. Williams also admitted that he did not consult with any of the people who worked with Hicks and Chester at the Chouteau Avenue warehouse regarding their respective job performances. Williams further acknowledged that the operations at the Benton terminal were chaotic before Hicks arrived. Williams also observed Hicks' performance for only about a month before deciding to fire him, and completed no performance evaluation of his work while he was at the Benton terminal. Brown Group also admitted at trial that Hicks performed his duties in a competent and satisfactory manner. Hicks denied telling Williams that he was unhappy at the Benton terminal or that he wanted more money. Based on these facts, the jury could have concluded that Brown Group's explanation for discharging Hicks was pretextual.

The jury could also have found that Hicks was as well or better qualified than Chester. In addition to Hicks' greater overall experience with Brown Group, the jury may have believed that Hicks had more experience as a full-fledged supervisor because Chester's evaluation forms described his position as "assistant supervisor" as recently as

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[46] As a condition for relocating to Benton, Hicks and Chester were required to accept a pay cut from $414.00 per week to $325.00 per week. After Hicks was terminated and Chester took over the night shift, he was given a $25.00 raise.

September 1978. The jury could have found that Hicks was better suited to be the night shift supervisor at the Benton terminal because he had supervised the night shift on the raw materials dock at the Chouteau Avenue warehouse for two years immediately before his transfer to the Benton terminal, whereas the bulk of Chester's experience was on the day shift.[47]

Other competent evidence existed from which the jury could have inferred that race made a difference in Hicks' discharge. For example, the jury could have chosen to credit Hicks' testimony about the evasive answers and "side smirk" given by Williams when Hicks asked him whether he was terminated because he was white and Chester was black. A decisionmaker's evasiveness or inconsistency in articulating the reasons for a discharge has been found to constitute evidence of discrimination. *See Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1064 (8th Cir. 1988); *United States v. Wolf*, 839 F.2d 1387, 1395 n.5 (10th Cir.) ("[w]here a person hears, understands and has the opportunity to deny an accusatory statement made in his presence, the statement and his failure to deny it are admissible against him as an adoptive admission"), *cert. denied*, 109 S. Ct. 304 (1988). The jury also could have credited Hicks' testimony that he was told by his superiors on three separate occasions that seniority was used to decide which supervisor would receive available jobs or assignments. The jury could have found that Brown Group had a policy to make employment decisions based on seniority, and that it violated this policy by terminating Hicks despite the fact that he had more overall and supervisory seniority than Chester. Brown Group further ac-

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[47] Contrary to Brown Group's suggestion, we do not believe that our decision in *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161 (8th Cir. 1985) (*Holley*), requires us to reverse the jury's finding of intentional race discrimination. First, *Holley* is an age discrimination case, and it is unclear whether its principles apply to Section 1981 race discrimination claims. More importantly, "[i]n *Holley*, the plaintiff presented absolutely no evidence from which the jury could reasonably infer discriminatory animus." *Estes*, 856 F.2d at 1101. Such is clearly not the case here. Viewing the evidence in the light most favorable to Hicks, evidence existed from which the jury could have reasonably inferred intentional race discrimination.

knowledged that it had an affirmative action policy. The jury also considered Brown Group's EEO-1 Employer Information Report, which documented a paucity of black employees in important jobs categories. Based on Brown Group's affirmative action plan and the EEO-1 report, the jury could have inferred that Chester was retained and Hicks terminated in order to increase the percentage of minorities in supervisory positions.

Our role is not to review the evidence *de novo*. We express no opinion on whether or not Hicks was in fact discharged because of his race. We hold only that, viewing the evidence in light most favorable to Hicks, the jury could reasonably have inferred that he was discharged because of his race. *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1100 (8th Cir. 1988). Because reasonable jurors could have differed as to the conclusions that could be drawn from the evidence, the district court did not err in denying Brown Group's motion for a JNOV. *See McGee*, 712 F.2d at 343.

IV. Intentional Discrimination

Brown Group also alleges that the jury instructions and special interrogatories submitted by the district court permitted the jury to find a Section 1981 violation without proof of intentional discrimination. At trial, Brown Group objected to Instruction No. 9 on the ground that it lessened the requisite standard of proof in a Section 1981 case. Instruction No. 9 provided that "[p]laintiff is required to prove that his race or his age was either a determining factor or a discernible or motivating factor in the defendant's decision to remove plaintiff from his position."[48] Brown Group also objected to Special Interrogatory

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[48] Instruction No. 9 defines "determining factor" and "discernible or motivating factor" as follows:

> The term "determining factor" means a factor which made a difference in determining whether or not plaintiff was to be retained or terminated.
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> The term "discernible or motivating factor" means a factor which was one among two or more factors that played a part in, but did not necessarily control, the decision whether or not to retain or to terminate plaintiff.

No. 7[49] for the same reason that it objected to Instruction No. 9.

In order to establish a Section 1981 violation, intentional or purposeful discrimination must be proven. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982); *Edwards v. Jewish Hosp.*, 855 F.2d 1345, 1351 (8th Cir. 1988) (*Edwards*). Considered as a whole, the jury instructions and Special Interrogatories adequately instructed the jury that Hicks was required to prove intentional or purposeful discrimination to establish a Section 1981 violation. The district court instructed the jury that Section 1981 made it "unlawful for an employer to discharge a person intentionally because of that person's race." Instruction No. 7. Instruction No. 8 elaborated that "[a]n act is done 'intentionally' if it is done knowingly and voluntarily and not because of mistake, accident, or other proper reason." Instruction No. 10 further provided that "an employer may lawfully terminate an employee and retain a younger employee who is of a different race, unless the employer's decision to do so is intentionally motivated by race or age." Special Interrogatories 5 and 7 also asked specifically about intentional race discrimination. "Where the instructions, considered as a whole, adequately and sufficiently state the generally applicable law, the fact that the instructions are technically imperfect or are not a model of clarity does not render the charge erroneous." *Tribble v. Washington*, 699 F.2d 1193, 1197 (8th Cir. 1982) (citations omitted), *cert. denied*, 460 U.S. 1080 (1983). So long as the generally applicable law is fairly stated, the district court is not required to utilize specific language or adopt any given sequence when instructing the jury. The jury instructions and Special Interrogatories in this case adequately conveyed the necessity of finding intentional discrimination for a Section 1981 violation.

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[49] Interrogatory No. 7 provides:

> Do you, the jury, unanimously find by a preponderance of the evidence that the defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a discernible or motivating factor in his termination from employment by defendant?"

V. Punitive Damages

Brown Group next argues that the district court erred in denying its motion for a JNOV because punitive damages may not be awarded without actual or nominal damages, and the district court's award of $1.00 nominal damages by additur after the jury awarded punitive damages violated its seventh amendment right to a jury trial. Brown Group further contends that the punitive damage award was not supported by sufficient evidence of evil motive or reckless or callous indifference to Hicks' federal civil rights.

A. Seventh Amendment Claim

We agree that additur is generally impermissible in federal actions because it violates the seventh amendment right to a jury trial. *See Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935); *Novak v. Gramm*, 469 F.2d 430, 432 (8th Cir. 1972). However, Brown Group misapprehends the significance of the jury's finding of a Section 1981 violation. Brown Group's seventh amendment right to a jury trial was satisfied when it received a jury trial on Hicks' Section 1981 claim.[50] Its seventh amendment rights were not further implicated by the district court's additur of $1.00 nominal damages, because Hick's proof of a Section 1981 violation automatically entitled him to nominal damages.

In *Carey v. Piphus*, 435 U.S. 247 (1978) (*Carey*), the Supreme Court held that the violation of certain absolute rights may entitle the plaintiff to an award of nominal damages even without proof of actual damages, and found that procedural due process was one such absolute right:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By

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[50] In *Setser v. Novak Investment Co.*, 638 F.2d 1137, 1140 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981), we held that parties in a Section 1981 action had a right to a jury trial of their legal claims. Hicks and Brown Group received the required jury trial, and the jury found that Brown Group had violated Section 1981 insofar as Hicks' race was "a determining factor" and "a discernible or motivating factor" in his termination. Special Interrogatories Nos. 5 & 7.

> making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or in the case of exemplary of punitive damages, to deter or punish the malicious deprivations of rights.
>
> Because the right to procedural due process is "absolute" in the sense that it does not depend on the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

Id. at 266 (citations omitted). *See Hogue v. Clinton*, 791 F.2d 1318, 1323 (8th Cir.), *cert. denied*, 479 U.S. 1008 (1986).

Relying on *Carey*, we held in *Edwards* that the Section 1981 right to be free from discrimination is absolute and proof of its violation entitles the plaintiff to nominal damages. 855 F.2d at 1350. The *Edwards* court reasoned as follows:

> [I]t cannot be seriously disputed that the right to be free from intentional racial employment discrimination is absolute in the same sense [as the right to procedural due process]. This much is implicit in the one hundred and twenty-two years of American social history since the decision was made to eliminate slavery and the badges and incidents thereof.

Id. We reiterate here that intentional racial discrimination, regardless of against whom it is directed, has no place in American society. Section 1981 thus grants an absolute right to be free of discrimination in the making and enforcement of contracts, the violation of which entitles the victim to nominal damages irrespective of actual injury. We hold that Hicks was entitled to at least nominal damages upon showing a violation of his Section 1981 rights.

Because proof of a violation of Section 1981 automatically entitled Hicks to nominal damages regardless of the district court's additur of

$1.00 nominal damages, we find that the district court did not err in using additur to clarify the legal consequences (e.g., presumed nominal damages) of the jury's findings of discrimination in violation of Section 1981.[51] The nominal damages to which Hicks was entitled supported the $10,000 award in punitive damages.[52] Brown Group received the jury trial required by the seventh amendment. It cannot now be heard to complain about the legal consequences of the jury's determination that it had violated Hicks' absolute right to be free from discrimination in the making and enforcement of contracts.

Citing *Mitchell v. Keith*, 752 F.2d 385, 390 (9th Cir.), *cert. denied*, 472 U.S. 1028 (1985) (*Mitchell*), Brown Group argues that the question of whether a punitive damage award can stand absent actual or nominal damages has not been resolved by federal law, and urges us to look to Missouri law to determine whether the award can stand. According to Brown Group, Missouri law forbids the recovery of

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[51] This court has directed the judicial entry of nominal damages when an award of actual damages cannot be sustained. *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 742 (8th Cir. 1985); *Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982) ("having prevailed on the discrimination issue . . . [plaintiff] is entitled to recover nominal damages of at least $1.00 as well as reasonable attorney's fees for proceedings in the district court"). *See Stepter v. Underhill*, 687 F. Supp. 1186, 1187 (S.D. Ohio 1988) ($1.00 nominal damages entered by court upon jury finding of race discrimination); *Wright v. Jasper's Italian Restaurant, Inc.*, 672 F. Supp. 424, 426 (W.D. Mo. 1987) ("[U]nder appropriate circumstances, judges can independently direct the entry of nominal damage judgments. A legal implication of damages arises whenever a legal right of plaintiff is violated.") (citation omitted).

[52] Brown Group does not dispute that nominal damages can support a punitive damage award where the standard of proof for imposition of punitive damages is met. *See Goodwin v. Circuit Court*, 729 F.2d 541, 542-43 (8th Cir.) (nominal damages support punitive damages award), *cert. denied*, 469 U.S. 828 (1984); *Edwards*, 855 F.2d at 1352 (nominal damages supports $25,000 punitive damage award). Nor is there a requirement that the punitive damage award bear a reasonable relationship to the nominal damages. "To apply the proportionality rule to a nominal damages award would invalidate most punitive damages awards because only very low punitive damages awards could be said to bear a reasonable relationship to the amount of a nominal damages award." *Edwards*, 855 F.2d at 1352.

punitive damages absent a recovery of nominal damages. *See Compton v. Williams Bros. Pipeline Co.*, 499 S.W.2d 795, 797 (Mo. 1972). We disagree that Missouri law applies.[53] There is no need to resort to Missouri law because federal law has addressed and resolved the issue raised by Brown Group. *See Mitchell*, 752 F.2d at 390 (appropriate to look to state law when federal law is "deficient in the provisions necessary to furnish suitable remedies"). Under *Carey* and *Edwards*, Section 1981 confers an absolute right to be free of discrimination in the making and enforcement of contracts, and the violation of this right automatically entitles the plaintiff to an award of nominal damages which can support an award of punitive damages if the standard of proof is met. *See Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965) ("[a]s a matter of federal common law it is not necessary to allege nominal damages and nominal damages are proved by proof of deprivation of a right to which the plaintiff is entitled"). Applying federal law to determine Hicks' entitlement to the Section 1981 punitive damage award also satisfies the requirement that damages issues be determined in accordance with a federal standard which furthers the purpose of the civil rights statutes. *Sullivan*, 396 U.S. at 238-40 (1969); *see Gordon v. Norman*, 788 F.2d 1194, 1199 (6th Cir. 1986) (court refuses to reverse punitive damages award in 42 U.S.C. § 1983 action even though such damages are not recoverable under state law). For these

---

[53] Even assuming that Missouri law applies, we are not convinced that Hicks would be stripped of his punitive damages award under Missouri law. Applying the law of Missouri in *Wright v. Jasper's Italian Restaurant, Inc.*, 672 F. Supp. at 426 (citation omitted), the United States District Court for the Western District of Missouri noted a distinction between "direct injury" torts and those torts where "pecuniary loss constitutes a part of the cause of action." The court found that the torts at issue, assault and false imprisonment, were direct injury torts liked trespass, where the wrong is committed regardless of pecuniary loss. *Id.* Reasoning that a legal implication of damages arises whenever a legal right of plaintiff is violated, the court upheld punitive damage awards totaling $55,000 despite the fact that the jury did not award actual damages. *Id.* Section 1981 is an absolute prohibition of discrimination in the making and enforcement of contracts. It is not necessary to prove actual damages to establish a Section 1981 violation. *Edwards*, 855 F.2d at 1352. Consequently, we believe that Missouri courts would view Section 1981 as a direct injury tort which, upon proof of its violation, raises a legal implication of nominal damages sufficient to support a punitive damages award.

reasons, we find that federal law applies, Hicks automatically became entitled to nominal damages upon proving a Section 1981 violation, and the district court did not violate Brown Group's seventh amendment right to a jury trial by its additur of $1.00 nominal damages.

B. Sufficiency of the Evidence

Hicks also contends that the district court erred in denying its motion of a JNOV because the jury's award of punitive damages was not supported by sufficient evidence. In *Smith v. Wade*, 461 U.S. 30, 56 (1983) (*Smith*), the United States Supreme Court held that "a jury may be permitted to assess punitive damages in an action under [42 U.S.C.] § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." This court applied the *Smith* punitive damages test to Section 1981 actions in *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1246 (8th Cir. 1983) (*Block*).

We first note that the jury was instructed properly that it could award punitive damages if it found that Hicks' firing was "motivated by evil motive or interest, or that defendant was callously indifferent to plaintiff's federally protected rights." Instruction No. 13. Viewing the evidence, as we must, in the light most favorable to Hicks, we hold that there was sufficient evidence for the jury to conclude that Hicks was entitled to punitive damages. *See Tolan*, 867 F.2d at 469. The district court properly denied Brown Group's motion for a JNOV on the punitive damages award because reasonable jurors cold have differed as to whether Brown Group was reckless or callously indifferent to Hicks' federal rights. *See McGee*, 712 F.2d at 343.

For example, the jury could have found that Brown Group acted recklessly or with callous indifference to Hicks' federally protected rights by discharging him after 34 years of service because of his race, and giving his job to a junior employee despite a company policy to make employment decision based on seniority. *See Block*, 712 F.2d at 1247-48 (finding of purposeful race discrimination under Section 1981 may in and of itself justify award of punitive damages). Moreover, after Hicks was discharged, he twice asked Rich Williams, his immediate supervisor and the person who made the decision to

discharge him, whether he was terminated because of his race. The jury could have found that the evasive, teasing responses of Rich Williams to Hicks' earnest inquiries constituted callous or reckless indifference to Hicks' federally protected rights. Based on these facts, and after observing the demeanor and credibility of the witnesses, the jury could have concluded that Brown Group was callously indifferent to Hicks' federally protected rights. Whether or not punitive damages should be awarded is a jury determination that is rarely disturbed. *See Garza v. City of Omaha,* 814 F.2d 553, 556 (8th Cir. 1987). As stated by this court in *Goodwin v. Circuit Court,* "[j]uries are uniquely suited to make this kind of moral judgment." 729 F.2d 541, 548 (8th Cir.), *cert. denied,* 469 U.S. 828 (1984). Because of the proper jury instruction, the finding of intentional discrimination, and Williams' evasive responses, we decline Brown Group's invitation to substitute our moral judgment for that of the jury.

VI. Cross-Appeal: Equitable Relief

Having found none of the issues raised by Brown Group to merit reversal, we turn now to Hicks' cross-appeal. Hicks argues that the district court erred in denying his post-trial motion for reinstatement and related equitable relief despite the fact that he had successfully proven that he would not have been discharged except for his race. Hicks argues that the district court erred in allowing the jury to answer Special Interrogatories Nos. 7 and 10 after the jury found in Special Interrogatory No. 5 that race was a "determining factor in his termination from employment."

The three Special Interrogatories in dispute provided as follows:

> Special Interrogatory No. 5.
>
> Do you, the jury, unanimously find by a preponderance of the evidence that the defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a determining factor in his termination from employment by defendant?
>
> Answer: Yes.

Special Interrogatory No. 7.

Do you, the jury unanimously find by a preponderance of the evidence that the defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a discernible or motivating factor in his termination from employment by defendant?

Answer: Yes.

Special Interrogatory No. 10.

Do you, the jury, unanimously find by a preponderance of the evidence the defendant Brown Group, Inc., would have terminated plaintiff Kenneth Hicks from employment, even had plaintiff's race and age not been a discernible or motivating factor or a determining factor in the decision to terminate?

Answer: Yes.

Hicks argues that Special Interrogatories numbers 5 and 10 ask the same question, namely whether Hicks' race was the "but for" cause of his termination. Hicks argues that Special Interrogatory No. 10 should be disregarded as surplusage, and requests this court to grant him reinstatement and related equitable relief. In the alternative, Hicks requests a partial new trial in order for the jury to determine, given that race played a role in his discharge, whether it made a difference in determining the outcome of that decision.

Brown Group does not respond to the apparent conflict between Special Interrogatories Nos. 5 and 10, but instead argues that *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (plurality opinion) (*Price Waterhouse*), requires that judgment be entered in its favor because the jury's answer to Special Interrogatory No. 10 established that Hicks would have been discharged even if his race was not taken into account. *Price Waterhouse* is a mixed-motive Title VII case decided by the Supreme Court while this appeal and cross-appeal were pending. In *Price Waterhouse*, the plurality held that once a plaintiff proves that a prohibited factor "played a motivating part in an employment decision, the defendant may avoid a finding of *liability* only

by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [impermissible factor] into account." *Id.* at 1795 (emphasis added). Brown Group argues that *Price Waterhouse* implicitly overruled *Bibbs v. Block*, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc), which held that an employer who shows that it would have made the same decision may avoid promotion or reinstatement, but not liability under Title VII. Brown Group further argues, without discussing the different purposes and legislative histories of Title VII and Section 1981, that *Price Waterhouse* also undermines this court's Section 1981 decisions and the Special Interrogatories in this case.

While the Special Interrogatories in this case were indeed confusing, we need not address whether they constitute reversible error. Hicks' counsel failed to object to Special Interrogatory No. 10 at trial despite having the opportunity to do so. Consequently, the issue was not preserved for appellate review. *United States v. Carey*, No. 89-5298, slip op. at 3 (8th Cir. Mar. 14, 1990); *United States v. Elem*, 845 F.2d 170, 173 (8th Cir. 1988); *Patterson v. United States*, 361 F.2d 632, 636 (8th Cir. 1966). We need not address the merits of Hicks' cross-appeal and Brown Group's response, and leave for another day the determination of the precise effect (if any) that *Price Waterhouse* has on this court's Section 1981 and Title VII precedent.

CONCLUSION

To summarize, we hold that (1) racially discriminatory discharge continues to be actionable under Section 1981 after *Patterson*; (2) the district court did not err in denying Brown Group's motion for a JNOV because the jury's finding of race discrimination was supported by sufficient evidence; (3) the jury instructions and Special Interrogatories adequately instructed the jury on the need to prove intentional discrimination to establish a Section 1981 violation; (4) the district court did not violate Brown Group's seventh amendment right to a jury trial by its additur of $1.00 in nominal damages, and the punitive damages award was supported by sufficient evidence; and (5) the court need not reach the merits of Hicks' cross-appeal or Brown Group's response

because Hicks failed to properly preserve this issue for appellate review. Accordingly, the judgment of the district court is

AFFIRMED.

FAGG, Circuit Judge, dissenting.

I respectfully dissent. In my opinion this case is controlled by the Supreme Court's decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

In *Patterson*, the Supreme Court considered the meaning and coverage of 42 U.S.C. § 1981. In doing so, the Supreme Court declared that "[w]here an alleged act of discrimination does not [impair the making and enforcement of contracts], [section] 1981 provides no relief." *Id.* at 2372. This construction of section 1981 is binding on the courts of appeals. *In re Continental Inv. Corp.*, 586 F.2d 241, 248 (1st Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *United States v. Herrera*, 584 F.2d 1137, 1145 (2d Cir. 1978); *United States v. LeFaivre*, 507 F.2d 1288, 1294 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

Because the *Patterson* majority did not expressly limit its construction of the language of section 1981 to the factual circumstances before the Court, "it is the principle [that] controls and not the specific facts [on] which the principle was decided." *Walker v. Georgia*, 417 F.2d 5, 8 (5th Cir. 1969). Nevertheless, our court lamely declines to apply *Patterson* because "[discriminatory] discharge was not at issue or discussed [in *Patterson*], and nothing in [*Patterson*] requires us to overrule the numerous and long-settled cases in this circuit which hold that discriminatory discharge is actionable under [s]ection 1981." *Ante* at 8-9. I believe our court has mistakenly concluded that *Patterson* is not a controlling precedent in this case.

Although *Patterson* is factually distinguishable, the Supreme Court's decision is legally relevant because it is a decision in the identical area of the law. *Levine v. Heffernan*, 864 F.2d 457, 460 & n.8 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989). When a court of appeals is faced with "a factually distinguishable but legally relevant Supreme Court decision, . . . [the court] may not employ a different standard in

analyzing the different facts [because to do so] would [ ] limit [ ] both the Supreme Court's decision and its method of analysis to a particular set of facts." *Id.* at 460.

Patterson's and Hicks's claims of racial discrimination in their employment were clearly triggered by different facts — racial harassment for Patterson and racial discriminatory discharge for Hicks. Despite these factual differences, the Supreme Court's construction of section 1981 in *Patterson* controls the outcome of Hicks' case because both Patterson and Hicks brought their claims of racial discrimination in the workplace under the identical statute. Our court is "obliged [ ] rigorously [to] apply the prevailing, majority precedent" in *Patterson*.. *Ferina v. United States*, 340 F.2d 837, 839 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965); *see also Rodriguez De Quijas v. Shearson/American Express*, 109 S. Ct. 1917, 1922-23 (1989) (Stevens, J., dissenting) (court of appeals refusal to follow a controlling Supreme Court precedent is "an indefensible brand of judicial activism").

Because section 1981 "prohibits discrimination only in the making and enforcement of contracts," *Patterson*, 109 S. Ct. at 2372, Hicks's claim must fail. Hicks's claim of discriminatory discharge "involves [n]either a refusal to make a contract with [him] or the impairment of [his] ability to enforce [his] established contract rights. Rather, the conduct which [Hicks] labels as actionable racial [discriminatory discharge] is postformation conduct by the employer relating to the terms and conditions of continuing employment. . . . This type of conduct . . . is not actionable under [section] 1981 . . . ." *Id.* at 2374.

The decision in *Patterson* is controlling in this case and binding on our court. Thus, I would reverse the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
1114 Market Street
St. Louis, Missouri 63101

October 26, 1988

RE: KENNETH HICKS vs. BROWN GROUP d/b/a BROWN SHOE

85-1392C(2)

Michael J. Hoare/Susan L. Amato
314 North Broadway
St. Louis, MO 63102

Thomas M. Hanna
2730 North Ballas Road,
Ste. 200
St. Louis, MO 63131

_____ Enclosed is a copy of the Report and Recommendation entered in the above-styled cause this day by the United States Magistrate _____

_____ Enclosed is a copy of the Review and Recommendation entered in the above-styled cause this day by the United States Magistrate _____

_____ Enclosed is a copy of the Order entered in the above-styled cause this day by the United States Magistrate_____

_____ Enclosed is a copy of the ORDER and RECOMMENDATION with MEMORANDUM entered in the above-styled cause this day by the United States Magistrate

_____

_____ Enclosed is a copy of the MEMORANDUM and ORDER entered in the above-styled cause this day by the United States Magistrate_____

__xx__ Enclosed is a copy of the MEMORANDUM & JUDGMENT entered in the above-styled cause on 10/26/88 by the United States Magistrate David D. Noce.

Very Truly Yours;
Eyvon Mendenhall, Clerk

BY:/s/ K. Moore
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-1392 C (2)

KENNETH G. HICKS,
Plaintiff,

v.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Defendant.

MEMORANDUM

(Filed: October 26, 1988)

This action is before the Court following the rendering by the jury of its findings and the filing of post-trial memoranda by the parties.

In its findings the jury found that defendant did not violate plaintiff's rights under the Age Discrimination in Employment Act. (Special Interrogatory Answers 1, 2, and 3.) The jury found that defendant did violate plaintiff's rights under 42 U.S.C. §1981, that no compensatory damages were suffered, but that plaintiff was entitled to recover $10,000.00 in punitive damages. (Special Interrogatory Answers 5, 6, 7, 8, and 9.) Finally, the jury found that plaintiff would have been terminated even without the unlawful race discrimination. (Special Interrogatory Answer No. 10.)

After considering the memoranda of the parties, the jury's findings shall be enforced by judgment in favor of plaintiff for one dollar in nominal damages, plus $10,000.00 in punitive damages. *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Edwards v. Jewish Hospital of St. Louis*, __ F.2d __, 47 Fair Empl. Prac. Cas. (BNA) 1331, slip op. Nos. 86-2494, 86-2495 (8th Cir., filed September 2, 1988). The jury having found that defendant would have terminated plaintiff absent unlawful

discrimination, plaintiff is entitled to no equitable relief. *Id., at* slip op. 8; *cf., Bibbs v. Block,* 778 F.2d 1318 (8th Cir. 1985).

Judgment is accordingly rendered herewith.

/s/ David D. Noce
UNITED STATES MAGISTRATE

Signed this 26th day of October, 1988.

APPENDIX C

INSTRUCTION NO. 9

Plaintiff is required to prove that his race or his age was either a determining factor or a discernible or motivating factor in the defendant's decision to remove plaintiff from his position.

The term "determining factor" means a factor which made a difference in determining whether or not plaintiff was to be retained or terminated.

The term "discernible or motivating factor" means a factor which was one among two or more factors that played a part in, but did not necessarily control, the decision whether or not to retain or to terminate plaintiff.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-1392 C (2)

KENNETH HICKS,
Plaintiff,

v.

BROWN GROUP, INC.,
Defendant.

SPECIAL INTERROGATORIES

1. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his age in that his age was a determining factor in his termination from employment by defendant?

Answer: (Yes or No) NO

[If the answer to Question No. 1 is Yes, the jury should answer No. 2, not answer No. 3, and proceed to No. 4. If the answer to No. 1 is No, the jury should not answer No. 2 and should proceed to No. 3.]

2. What back pay and benefits of employment do you, the jury, unanimously find by a preponderance of the evidence that plaintiff has lost from the date of his termination to today as a direct result of the facts found by the jury with respect to Question No. 1?

Answer: NONE Dollars ($_____.)
(IF NONE, WRITE "NONE")

3. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his age in that his age was a discernible or motivating factor in his termination from employment by defendant?

Answer: (Yes or No) NO

[If the answer to No. 3 is Yes, the jury should answer No. 4. If the answer to No. 3 is No, the jury should not answer No. 4 and should proceed to No. 5.]

4. Do you, the jury, unanimously find by a preponderance of the evidence that with respect to the facts found by the jury concerning Question No. 1 and Question No. 3, that defendant Brown Group, Inc., knew, or showed reckless disregard for whether, its actions violated the Age Discrimination in Employment Act?

Answer: (Yes or No) _____

5. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a determining factor in his termination from employment by defendant?

Answer: (Yes or No) YES

[If the answer to No. 5 is Yes, the jury should answer No. 6. If the answer to No. 5 is No, the jury should not answer No. 6 and should proceed to No. 7.]

6. What back pay and benefits of employment do you, the jury, unanimously find by a preponderance of the evidence that plaintiff has lost from the date of his termination to today as a direct result of the facts found by the jury with respect to Question No. 5?

Answer: NONE Dollars ($_____.)
(IF NONE, WRITE "NONE")

7. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a discernible or motivating factor in his termination from employment by defendant?

Answer: (Yes or No) YES

[If the answer to No. 5 or No. 7 is Yes, the jury should answer No. 8. If the answer to No. 5 and No. 7 is No, the jury should answer no more questions, the foreperson should sign the form, and the jury should return the form into court.]

8. Do you, the jury, unanimously find by a preponderance of the evidence with respect to the facts you find concerning Questions No. 5 and No. 7 that defendant acted out of evil motive or intent, or acted with callous indifference to plaintiff's federally-protected rights?

Answer: (Yes or No) YES

[If the answer to No. 8 is Yes, the jury should answer No. 9. If the answer to No. 8 is No, the jury should not answer No. 9, and should answer No. 10.]

9. What punitive damages do you, the jury, unanimously find by a preponderance of the evidence should be awarded to plaintiff and against defendant as a direct result of the facts found by the jury with respect to Question No. 8?

Answer: _____ Dollars ($ 10,000 .)
(IF NONE, WRITE "NONE")

[If either No. 1, No. 3, No. 5, or No. 7 was answered Yes, the jury should answer No. 10. If the answers to No. 1, No. 3, No. 5, and No. 7 were No, the jury should not answer No. 10, but the foreperson should sign the form and return it into court.]

10. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., would have terminated plaintiff Kenneth Hicks from employment, even had plaintiff's race or age not been a discernible or motivating factor or a determining factor in the decision to terminate?

Answer: (Yes or No) YES

/s/ SIGNATURE ILLEGIBLE
FOREPERSON

Dated this 5th day of October, 1988.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2769/2817EM

Kenneth G. Hicks,
Appellee/Cross-Appellant,

vs.

Brown Group, Inc., d/b/a
Brown Shoe Company, Inc.,
Appellant/Cross-Appellee.

Order Denying Petition For Rehearing and
Suggestion For Rehearing En Banc

Appellant/Cross-Appellee's and Appellee/Cross-Appellant's suggestions for rehearing en banc have been considered by the court and are denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petitions for rehearing by the panel are also denied.

Judges Fagg, Bowman, Magill and Beam would have granted the petitions.

June 4, 1990

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
NOV 16 1990
GEORGE F. SPANIOL, JR.
CLERK

(2)

No. 90-324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Petitioner,

VS.

KENNETH O. HICKS,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN D. LYNN
MICHAEL J. HOARE, P.C.
314 N. Broadway, Suite 1130
St. Louis, Missouri 63102
(314) 241-7961
Attorneys for Respondent Hicks

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit was in error when it determined that the discharge of Plaintiff, allegedly because of his race, was cognizable pursuant to 42 U.S.C. §1981?

2. Whether the Eighth Circuit was in error when it affirmed the district court's finding of racially discriminatory discharge on a finding that race was a "discernible or motivating factor" which "played a part in but did not control" the employer's decision?

3. Whether the Eighth Circuit was in error when it affirmed the district court's finding of racially discriminatory discharge despite the jury's specific finding that even if race had not been a factor the employer would have made the "same decision" to terminate the plaintiff?

4. Whether the district court may grant additur of one dollar ($1.00) as nominal damages in circumstances where the jury found that a violation of 42 U.S.C. §1981 occurred while also finding that plaintiff suffered no actual damages and awarding no monetary damages?

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No. 90-324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Petitioner,

vs.

KENNETH O. HICKS,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATION TO OPINION BELOW

The opinion of the three judge panel of the Eighth Circuit Court of Appeals, rendered on April 16, 1990, is reported at 902 F.2d 635 (8th Cir. 1990). The full Court of Appeals denied rehearing en banc on June 4, 1990. A copy of the panel's opinion is printed as Appendix A to petitioner's submission and hence will not be reprinted herein by respondent.

SUMMARY OF ARGUMENT

Petitioner asks this Court to review four issues decided by the Eighth Circuit Court of Appeals. First and foremost is the question whether a racially motivated discharge from employment is actionable

under 42 U.S.C. § 1981 after this Court's decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989). The Eighth Circuit answered in the affirmative. This ruling should be left undisturbed for two reasons. First, it is correct on the merits. Second, and more importantly, Congress is in the process of considering legislation which, if adopted, would clarify the scope of the Section 1981 and make it clear to everyone that discriminatory discharge is covered by the statute. Out of deference to Congress the Court should refrain from making premature pronouncements on an important question of statutory interpretation at the very moment it is under consideration in the lawmaking branch of government. The Eighth Circuit's rulings on the other three issues raised by petitioner do not involve important questions of law and do not conflict with any decisions by other Courts of Appeal. Accordingly, they do not warrant review by this Court.

ARGUMENT

I. Petitioner Brown Group Contends That The Eighth Circuit's Ruling That Discriminatory Discharge is Actionable Under Section 1981 Conflicts With This Court's Decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989).

But *Patterson* did not address, much less decide, the question whether a racially motivated firing runs afoul of Section 1981. It emphasized that Section 1981 cannot be used to attack discrimination in the conditions of *continuing* employment, such as on-the-job harassment, but it never said it cannot be used to attack discrimination that actually *discontinues* employment, such as a discriminatory discharge. 109 S.Ct. at 2372. On the contrary, it carefully avoided all reference to the discharge issue, a conspicuous omission which the Eighth Circuit rightly deemed significant. *Hicks*, App. A at A8-A14.

Petitioner complains, however, that the Eighth Circuit's decision conflicts with the reasoning, if not the holding, in *Patterson*. This Court explained in *Patterson* that Section 1981 protects two rights: the right to make a contract and the right to enforce a contract. 109 S.Ct. at 2372-2373. According to petitioner, the first of these rights, the right to make a contract, serves only one function: it guarantees the applicant for a job that the employer will not refuse to enter into a contract of employment with him on account of his race. Once he gets the job, however, it serves no function. In the event the employer breaches the contract of employment, by firing the employee because of his race, then the second of these rights, the right to enforce a contract, guarantees him unimpeded access to a court of law to enforce his "established contract rights." That is petitioner's reading of Section 1981. On the surface, it sounds plausible. But only on the surface. Lurking just below the surface are two large and intolerable anomalies in petitioner's position. Petitioner pretends they do not exist. But they do exist. In fact, they are decisive in this case.

Understanding the first anomaly requires an understanding of the nature of contractual relationships in the employment context. In

1866, when Congress enacted Section 1981, virtually all members of the workforce were "at will" employees. This meant that their employer could terminate their contract of employment, at any time and for any reason, without incurring any liability under the law of contracts. These employees entered into contracts of employment — involving the exchange of services for pay — which their employer could terminate at will with or without just cause. The employer who fired such an employee because of his race *terminated* a contract of employment but it did not *breach* a contract of employment. Accordingly, the victim of discrimination had no remedy under the law of contracts. Guaranteeing him unimpeded access to a court of law to enforce his "established contract rights" meant absolutely nothing to him: he had no contract rights to enforce when he got there. Nor could he sue under Title VII since that statute would not exist until almost a century later. In short, the at will employee in 1866 had no remedy at all when the employer terminated his contract of employment for racial reasons.

Which raises a very deep problem: why would Congress in 1866 go to the trouble of protecting millions of at will employees against racially motivated infringements on their right to enter into contracts of employment only to leave their employers free to terminate those contracts for racial reasons whenever they pleased? What value is there in the right to make a contract of employment if the employer can terminate it with impunity a day, a week, a month or a year later? Did Congress really mean to confer a right on millions of employees that could be subverted so easily? Petitioner does not answer these questions; it does not even try. The Eighth Circuit, on the other hand, answered unanswerably. It concluded, with refreshing common sense, that Congress could not possibly have intended to give birth to a new substantive right that would be born a virtual nullity. It recognized, as this Court must, that nobody in their right mind would draft a statute that guaranteed the right to acquire a job but not the right to keep it. This simple insight, accessible to everyone, is important because courts are not at liberty to presume that Congress has taken leave of its senses. *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543-544 (1940). The Eighth Circuit's painstaking

analysis of the legislative history of Section 1981 validates its conclusion. *Hicks*, App. A at A21-A33. Both the historical evidence in general, and the legislative debates in particular, make it clear that Congress wanted to protect the *meaningful* exercise of the right to make a contract of employment. That right would be quite meaningless — a worthless paper guarantee — if it did not also include protection against the discriminatory termination of the contract. Because the inner logic of the Eighth Circuit's decision is unassailable, and because it furthers the manifest will of Congress, this Court should leave it undisturbed.

Petitioner presses the point, as if it is meaningful, that the victim of a discriminatory discharge has a statutory remedy under Title VII. But it is crucial to remember, because it is so easy to forget, that *Patterson* is *not* a pre-emption case. This Court did not say that employer misconduct covered by Title VII cannot be actionable under Section 1981. It long ago rejected the notion that the passage of Title VII effected an implied repeal of the rights conferred by Section 1981. *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975).[1] Indeed, *Patterson* expressly acknowledged that claims of refusal to hire based on race, as well as claims of refusal to promote, are cognizable under Section 1981 despite the overlap with Title VII. What the Court said was that it would not "twist" or "torture" the words of Section 1981 to cover discriminatory conduct already covered by Title VII when the result would be to subvert the administrative procedures established by Congress to conciliate Title VII claims. 109 S.Ct. at 2374-2375.

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[1] "We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies [Section 1981 and Title VII], to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a §1981 action while an EEOC claim is pending. We generally conclude, therefore, that the remedies available under Title VII and under §1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* Significantly, *Patterson* reaffirmed this important holding. 109 S.Ct. at 2375.

But it scarcely strains the meaning of the right to make a contract of employment to construe it to include protection against the unmaking of the contract. This is not a matter of "twisting" or "torturing" the words of a statute but of giving them practical significance. Common sense tells us that Congress gave people the right to make a contract of employment for one simple reason: so that they could have a job. The employer who fires an employee because of his race deprives him of the very thing — his job — that the right to make a contract of employment was designed to secure. That is not right. It defeats the whole purpose of Congress in granting the right to make a contract of employment. Racial harassment, on the other hand, is entirely different. It does not deprive the employee of his job (unless it is so severe as to result in a constructive discharge) and therefore does not negate the entire purpose of the right conferred by Congress. Furthermore, allowing actions for discriminatory discharge under Section 1981 would not subvert Title VII's mediation and conciliation procedures. As the Eighth Circuit explained:

> After an employee is discharged, the employment relationship is severed. At this point, there is no relationship to salvage. The absence of an employment relationship makes discharge equivalent to a refusal to contract. *Patterson* notes that a refusal to enter a contract on the basis of race would continue to be actionable under Section 1981 and Title VII, *id.* at 2375, but the Court was not troubled by the overlap because the interest in preserving the integrity of Title VII procedures is lessened considerably when an employment relationship does not exist. The Court held that "[a]t this stage of the employee/employer relation, Title VII's mediation and conciliation procedure would be of minimal effect, for there is not yet a relation to salvage." *Id.* Similarly, allowing an employee to challenge his or her discriminatory discharge under either Section 1981 or Title VII will not undermine Title VII's mediation and conciliation procedures, because there is no longer an employment relationship to salvage.

Hicks, App. A at A18. Significantly, petitioner expends no effort to attack the Eighth Circuit's reasoning on this point, perhaps acknowledging the futility of the attempt.

There is a second anomaly, not mentioned by the Court of Appeals below, which infects petitioner's reading of Section 1981. It stems from the fact that every discharge from employment, by its very nature, involves both a termination of a contract *and* a refusal to contract anew. The point is best illustrated with a hypothetical. Imagine a white manager of a corporate department, an incorrigible bigot, who fires his black assistant, hired by his predecessor, so he can replace him with a white person. He then accepts applications from the public to fill the vacant position. The black ex-employee applies for his old job, perhaps on the advice of his attorney. His application is denied, of course, for the same pretextual reason — whatever it was — that he was fired. If he has a cause of action under Section 1981 for wrongful refusal to hire — and he clearly does since the employer has refused to make a contract of employment with him — then why should we deny him a cause of action under Section 1981 for the wrongful discharge? Why should we draw an arbitrary distinction between the two claims when they are in reality the same? Why should we subscribe to any interpretation of Section 1981 that produces this kind of anomaly?

As before, petitioner does not answer these questions. In truth, nobody can untie this knot in logic. Because the plain fact of the matter is that every discriminatory discharge is, in practical reality, a discriminatory refusal to hire. *See Padilla v. United Airlines*, 716 F.Supp. 485, 490 (D.Colo. 1989). The employer fires the employee because of his race and then refuses, either implicitly or explicitly, to hire him back for the same reason. It makes no sense at all to say that a black person fired on Monday because of his race does not have a claim under Section 1981 *until* he returns to the jobsite on Tuesday to demand his job back and is denied it for the very same reason he was fired on Monday.

There is a final reason, more pragmatic, why the Court should stay its hand in this case. Congress is in the process of considering legislation which, if adopted, would answer the very question posed by petitioner. This Court should exercise judicial restraint in such a circumstance for two reasons. First, as a matter of efficiency, the Court must avoid wasting scarce resources taking cases that might be, for all practical purposes,

functionally moot. Second, as a matter of respect for Congress, the Court must avoid making pronouncements on important questions of statutory interpretation at the very moment they are under consideration in the lawmaking branch of government. To put both these points in context a brief sketch of current events is in order.

Recently Congress passed the Civil Rights Act of 1990 which strengthened the federal anti-discrimination laws and overturned a series of recent decisions by this Court construing those laws. Section 12 of the Act overruled *Patterson* and, in addition, made it clear to everyone that discriminatory discharge is actionable under Section 1981:

> Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended — . . .
>
> (2) by adding at the end thereof the following new subsections:
>
> "(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and *termination* of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

See H.R. Conf. Rep. No. 101-856, 101st Congress, 2d Session (emphasis added). President Bush vetoed the Civil Rights Act of 1990 on October 22, 1990, primarily because of one provision in the Act (Section 4) that he thought might lead employers to adopt hiring quotas. Two days later the Senate failed to override the veto by only one vote. Nevertheless, the President emphasized in his veto message to Congress, and in other public statements, that he earnestly wants to sign a civil rights bill. *See* Statements by the President, Office of the Press Secretary, dated October 20, 1990 and October 22, 1990.[2]

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[2] The President said: "Throughout Congressional consideration of this bill, I have said repeatedly that I want to sign a civil rights bill this year that addresses certain Supreme Court decisions regarding employment discrimination . . . . Throughout Congressional consideration of this bill, I have emphasized my support for legislation to strengthen our employment discrimination laws." Statement by the President, Office of the Press Secretary, dated October 20, 1990.

Indeed, when he vetoed the Civil Rights Act of 1990 he delivered to Congress an alternative bill that he said he would sign. Significantly, Section 11 of the President's proposal is an exact duplicate of Section 12 of the 1990 Act. *Id.* Which means that both the legislative and the executive branches of government are in complete agreement on two important points: first, that *Patterson* must be overruled and, second, that racially motivated firings violate Section 1981. In fact, they have never disagreed on these matters. *See, e.g.*, Statement of the Deputy Attorney General, *The Civil Rights Act of 1990: Hearings on H.R. 4000 Before the Committee on Education and Labor and the Committee on the Judiciary*, 101st Congress, 2d Sess. (1990) ("We believe that Congress should amend the law to require a different result than that reached by the Supreme Court in *Patterson*"). This consensus at both ends of Pennsylvania Avenue, on Capitol Hill and at the White House, is a compelling reality which no member of this Court can lightly ignore.

It is important because Congress will again be considering legislation in the next session of Congress, which begins in January, to overturn recent civil rights decisions by this Court, including *Patterson*. *See* New York Times, *Supporters Vowing to Try Again for Job-Discrimination Bill Vetoed by Bush*, October 26, 1990, at A14. There are at least three reason to believe that such legislation will become law. First, bipartisan support in Congress is overwhelming. In August the House approved the Civil Rights Act of 1990 by a margin of 64% and in October the Senate approved it by a margin of 66%. These margins will no doubt increase, since the Democrats gained one seat in the Senate and nine seats in the House during the recent midterm elections. Second, there is substantial agreement between the White House and Congress on the basic elements of a civil rights bill. In his veto message to Congress, President Bush emphasized the "significant similarities" between his bill and the Civil Rights Act of 1990, pointing to eight broad areas of agreement where "the Congressional majority and I are on common ground." Statement by the President, Office of the Press Secretary, dated October 22, 1990. Given this common ground, and the President's pledge that he wants to sign a civil rights bill, there is every reason to suppose that a new civil rights law, in some

form, will emerge from the next session of Congress. In fact, President Bush predicted as much in a recent press conference. *See* The White House, Office of the Press Secretary, November 8, 1990 ("I want to have a good civil rights bill. And so we'll be sending one up [to Congress] early on . . . and I think maybe we can get something positive done."). Third, Congress has proven its ability, with or without the support of the President, to change the civil rights laws in response to decisions by this Court. Indeed, in recent years it has never failed in such an endeavor, having succeeded on at least six different occasions. *See* Civil Rights Restoration Act of 1988, overturning *Grove City College v. Bell*, 465 U.S. 555 (1984); Handicapped Children's Protection Act of 1986, overturning *Smith v. Robinson*, 468 U.S. 992 (1984); Rehabilitation Act Amendments of 1986, overturning *Astascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); Voting Rights Act Amendments of 1982, overturning *Mobile v. Bolden*, 446 U.S. 555 (1980); Pregnancy Discrimination Act of 1978, overturning *General Electric v. Gilbert*, 429 U.S. 125 (1976); Civil Rights Attorneys Fees Award Act of 1976, overturning *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

Under these circumstances, it would be a waste of everyone's time for the Court to grant certiorari in this case to debate a question that might soon be rendered moot by legislative action. More importantly, it would show a disturbing lack of respect for and deference to Congress. The meaning of Section 1981 is a politically sensitive question of policy which the Constitution commits to Congress, not this Court, for final resolution. For this Court to make premature pronouncements on the meaning of Section 1981, at the very moment Congress is considering the question, would constitute an unseemly intrusion by the Court on the lawmaking role of Congress. It would also risk an embarrassing schism between the judicial and legislative branches of government over the meaning of a landmark civil rights statute. Justice Powell's views on the subject, expressed in a thoughtful concurring opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), are instructive. In that case, a plurality of the Court held that statutory classifications based on sex were inherently suspect and thus must be subjected to close judicial scrutiny under the Constitution. *Id.* at 682.

Justice Powell, joined by several other members of the Court, thought it wise to postpone consideration of this important issue pending the outcome of the debate over the Equal Rights Amendment. He wrote:

> There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.
>
> There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

Id. at 692. The same reasoning applies with equal force to this case. All federal courts, including this Court, must be careful to avoid interfering with the democratic process as it plays itself out in the political branches of government. A decent regard for Congress, and a prudent recognition of this Court's limited role in a representative government, dictates judicial restraint in this case.

To be sure, petitioner is correct when it says that some Circuits are divided over the question whether, after *Patterson*, a racially motivated termination from employment is actionable under Section 1981.

But the mere existence of a split in the Circuits is not a sufficient reason, by itself, to justify granting certiorari in a case. As one member of this Court has observed, "the doctrine of judicial restraint teaches us that patience in the judicial resolution of [intercircuit] conflicts may sometimes produce the most desirable result." Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 230, 233 (1983). This is such a case, for the reasons discussed. There will be time enough, should Congress fail to enact legislation clarifying the scope of Section 1981, for this Court to resolve any conflict in the Circuits. In the meantime it should exercise restraint, allowing the law under Section 1981 to continue to evolve in the lower federal courts. That is the prudent thing to do. After all, *Patterson* is only 16 months old. The majority of Circuits, including the First, Third, Fourth, Sixth, Tenth, Eleventh and District of Columbia Circuits, have not even addressed the precise question raised by petitioner. Under these circumstances, the Court should deny certiorari in this case.[3]

II. Petitioner Brown Group Contends That the Jury Instructions Given at Trial Were Flawed.

It is not easy to follow the thread of petitioner's argument here. Evidently, it is complaining about Instruction No. 9, which told the jury that race was a "discernible or motivating factor" in the discharge decision if it "played a part in but did not necessarily control the decision." This instruction was given to the jury to alert it to the possibility that the employer may have acted with "mixed motives" — that it may have relied upon both legitimate and illegitimate considerations in firing respondent Hicks. Petitioner complains that the definition of "discernible or motivating factor" was incomplete because it failed to specify that the employer must "actually rely" upon race in making the discharge decision. If that is petitioner's argument, then it is quibbling over words. It is hard to understand how a jury could

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[3] Only recently this Court refused to consider the question whether a retaliatory discharge from employment for filing a charge of discrimination with the E.E.O.C. is covered by Section 1981. *See Sherman v. Burke Contracting, Inc.*, No. 90-5322 (certiorari denied on October 29, 1990). It should do the same here.

think that race "played a part" in the employer's discharge decision without having been "actually relied" upon by the employer. Any error in Instruction No. 9 was harmless anyway, since the jury found in response to Special Interrogatory No. 5 that race was a "determining factor" in the discharge decision, defined in the general charge to the jury as a "factor which made a difference in determining whether or not plaintiff was to be retained or terminated." Needless to say, if race made a difference in petitioner's decision to fire Mr. Hicks then petitioner must have "actually relied" upon it.

III. Petitioner Brown Group Contends That Under *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), the Jury's Answer to Special Interrogatory No. 10 Relieves it of All Liability for Its Intentional Discrimination in This Case.

In every wrongful discharge case brought under Section 1981 the jury must answer two basic questions: (1) was race a motivating factor? and (2) did it make a difference? The first is a question of intent, the second a question of causation. The first asks whether race played a role in the employer's thinking, the second whether it made a difference in determining the outcome of the decision. In a single motive case the two questions are not analytically distinct; in a mixed motive case they are. *Bibbs v. Block*, 778 F.2d 1318, 1320-1321 (8th Cir. 1985) (en banc).

We cannot know, until the jury tells us, whether a case involves single or mixed employer motives. As a result, the trial court must submit special interrogatories to the jury that account for both possibilities. The good news is that there are clear and simple ways to do this. *See, e.g., Model Civil Rights in Employment Jury Instructions for the Eighth Circuit* (1989). The bad news is that the trial court was not aware of them at the time this case was tried. The special interrogatories it submitted to the jury were confusing and convoluted: a true semantic nightmare. Nevertheless, two things are reasonably clear. First, the jury found that race played a motivating role in petitioner's decision to fire Mr. Hicks. *See* Special Interrogatory No. 7. Second, the jury gave inconsistent answers to the question whether it played a decisive role — whether it actually made a difference to the outcome

of the decision. The basic problem is that Special Interrogatory No. 5 and Special Interrogatory No. 10 ask the same question, namely whether Mr. Hicks' race made a difference. In response to Special Interrogatory No. 5, the jury found that Mr. Hicks' race *did* make a difference — that it was a determining factor in petitioner's decision to fire him. *See Geller v. Markham*, 635 F.2d 1027, 1035 (2nd Cir. 1980). In response to Special Interrogatory No. 10, however, the jury found that Mr. Hicks' race *did not* make a difference — that petitioner would have fired him anyway even if his race had not been a factor in its decision. *See Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989). Needless to say, these two answers conflict with each other. They are the legal equivalent of the irresistible force meeting the immovable object. In short, the jury returned an inconsistent verdict.

Out of this confusion it is impossible to extract any issue worthy of this Court's review. If certiorari is granted, the Court will not find itself addressing the question posed by petitioner. On the contrary, it will find itself addressing an entirely different question, namely how to resolve an inconsistent jury verdict. That is hardly a matter of exceptional importance warranting review by this Court.

IV. Petitioner Brown Group Contends That the Trial Court's Award of One Dollar in Nominal Damages Against It Violated Its Right to Trial By Jury.

The jury was not asked to consider an award of nominal damages in this case. The trial court, however, awarded respondent Hicks $1.00 in nominal damages based on the jury's finding that petitioner intentionally discriminated against him on account of his race. According to petitioner, the trial court's imposition of $1.00 in nominal damages by additur, when the jury awarded zero actual damages, violated its right to trial by jury under the Seventh Amendment. Petitioner is mistaken.

All courts that have addressed the issue have held, without exception, that a plaintiff whose rights have been violated under either of the two Reconstruction Era Civil Rights Acts — Section 1981 and Section 1983 — may recover nominal damages without proof of actual injury. *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (Section 1983); *Edwards v. Jewish Hospital*, 855 F.2d 1345 (8th Cir. 1988) (Section 1981).

Petitioner does not seem to quarrel with this proposition but instead argues it is the jury, rather than the judge, that must decide whether or not to award nominal damages.

The problem with this argument is that it assumes the jury has some discretion in the matter. It does not. Nominal damages are awarded as recognition that the plaintiff's rights under Section 1981 or Section 1983 have been violated. *Id.* Once the jury finds a violation of plaintiff's rights, an award of nominal damages follows automatically. *Basista v. Weir*, 340 F.2d 74, 87 (3rd Cir. 1965); *Stepter v. Underhill*, 687 F.Supp. 1186, 1187 (S.D. Ohio 1988). Indeed, it cannot be otherwise. On what lawful basis could the jury refuse to award nominal damages to the plaintiff after it has found that his rights under the statute have been violated? Certainly not on the basis he did not suffer any actual harm; nominal damages are not awarded as compensation for loss or injury. *Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983). Rather, they are awarded as a matter of law upon a proven violation of law. They vindicate deprivations of certain "absolute" rights, including the absolute right under Section 1981 to be free from intentional racial discrimination. *Edwards, supra*, 855 F.2d at 1350. Because the jury found that Mr. Hicks was fired because of his race, even though he did not suffer any actual economic loss, the trial court did not err in awarding him one dollar in nominal damages.

CONCLUSION

Petitioner has failed to demonstrate the existence of any special and important reasons why a writ of certiorari should be granted in this case. Accordingly, the writ should be denied.

Respectfully submitted,

John D. Lynn

Michael J. Hoare, P.C.
314 N. Broadway, Suite 1130
St. Louis, MO 63101
(314) 241-7961

Attorneys for Respondent Hicks

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROWN GROUP, INC. d/b/a
BROWN SHOE COMPANY, INC.,
Petitioner,

vs.

KENNETH O. HICKS,
Respondent.

REPLY BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS M. HANNA*
FRED A. RICKS
PATRICIA M. MCFALL
MCMAHON, BERGER, HANNA,
LINIHAN, CODY & MCCARTHY
Suite 200
2730 North Ballas Road
St. Louis, Missouri 63131-3039
(314) 567-7350

Attorneys for Petitioner
**Counsel of Record*

EUGENE F. JORDAN
Associate General Counsel
BROWN GROUP, INC.
P.O. Box 29
8400 Maryland Avenue
St. Louis, Missouri 63166

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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REPLY BRIEF
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Pursuant to Rule 15.6, Rules of the Supreme Court of the United States, Petitioner submits the following Brief addressed to arguments first raised in the Brief in Opposition to the Petition For Writ of Certiorari pending herein.

SUMMARY OF ARGUMENT

Respondent urges this Court to refrain from making pronouncements on the scope and meaning of Section 1981 for the reason that Congress *may* pass legislation which, if adopted, would "clarify" the scope of Section 1981 to make it clear that discriminatory discharge is covered by the statute. Notwithstanding this wholly speculative

reliance on potential legislative change, Respondent nevertheless also urges this Court to leave undisturbed the Eighth Circuit's decision in this case because this Court's decision in *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S. Ct. 2363, 105 L.Ed.2d 132 (1989) did not address the question whether racially motivated firing runs afoul of Section 1981 and because the decision below is correct on the merits.

Petitioner must counter this argument by suggesting that this Court's decision on the merits herein would not only clarify the scope and meaning of Section 1981 in light of *Patterson* but could potentially obviate in part the call for the sweeping legislative change relied upon by Respondent. The legislation upon which Respondent grounds his appeal for judicial restraint certainly treats *Patterson* as having decided the issue whether racially motivated termination is actionable under Section 1981 (and such legislation has as an express purpose retrospective overruling of *Patterson*) in a fashion contrary to Respondent's view of the correctness of the decision below. In short, the question presented by this case is whether *Patterson* reaches the question of discriminatory discharge and whether the Eighth Circuit's decision construing Section 1981 to cover racially motivated discharge decisions is in harmony with *Patterson*. Because all other circuits addressing the question have reached a result contrary to the Eighth Circuit's decision herein, this Court's decision on the merits of this case would clarify the meaning of *Patterson* both for the judiciary and for Congress.

ARGUMENT

I. RESPONDENT'S ARGUMENT THAT DISCHARGE FROM EMPLOYMENT INVOLVES THE RIGHT TO "MAKE" A CONTRACT, ACTIONABLE UNDER SECTION 1981, HAS ALREADY BEEN REJECTED BY THIS COURT.

Respondent claims this court neither addressed nor decided the question whether Section 1981 covers claims of racially motivated discharge decisions in *Patterson*, yet Respondent argues vigorously that Section 1981 could not be read to exclude discharge decisions from its coverage. Despite Respondent's assertion (Brief in Opposition at 6-7) that he does not seek to "strain" the meaning of the right to "make" a contract of employment by construing such right to include protection against the "unmaking" of the contract (so as to bring discharge decisions within the ambit of Section 1981's protection of the right to "make", rather than to "enforce", contracts), Respondent's argument, that every discharge from employment involves both a termination of contract *and* failure to contract anew, serves only to "twist" and "torture" the language of Section 1981 in order to achieve the desired result. This Court was confronted with similar arguments and analytical efforts in *Patterson* (Part C) as advanced by the Solicitor General and Justice Brennan. In particular, this Court rejected Justice Brennan's argument that pervasive racial harassment in the terms or conditions of employment can rise to the level of an employer's refusal to make a contract. This Court emphatically stated:

> "However, and this is the crucial point, the question under §1981 remains whether the employer, *at the time of the formation of the contract*, in fact intentionally refused to enter into a contract with the employee on racially neutral terms." (Emphasis in original.)

Patterson v. McLean Credit Union, ___ U.S. ___, 109 S.Ct. 2363 at ___.

Respondent's effort here to bootstrap a challenge to the circumstances surrounding an employer's decision to discharge an employee into a claim under §1981 that the employer refused to offer the

discharged employee the "same right to . . . make" a contract is no different than an effort to transform a "pervasive harassment" claim into a "refusal to contract" claim already soundly rejected in *Patterson*.

Moreover, while Respondent urges that any other reading of the language of Section 1981 would result in wholesale subversion of the rights bestowed by that legislation, only the right to make and to enforce contracts is established therein. This Court, contrary to both Respondent's and the Eighth Circuit panel's analysis of the legislation history, has already held that "the legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights." *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). To say in light of such analysis that Congress intended by the bare language of Section 1981 to permit every discharged employee to claim subversion of his "same right to make" a non-discriminatory contract for hire, for wages for labor, strains beyond recognition the meaning of Section 1981.

Accordingly, this Court should grant the Petition for Writ of Certiorari herein in order to properly interpret the limits of the scope of protections afforded by Section 1981, particularly in light of this Court's analysis in *Patterson*.

II. THIS COURT IS NOT CONSTRAINED IN INTERPRETING SECTION 1981 AND APPLYING THE INTERPRETATION OF SECTION 1981 ENUNCIATED IN *PATTERSON* BASED UPON THE POSSIBILITY OF FUTURE LEGISLATIVE EFFORTS WHICH MAY OR MAY NOT BECOME LAW.

Respondent urges this Court to exercise judicial restraint and exhibit regard for Congress by declining to interpret Section 1981, in light of *Patterson*, in this case because (a) Congress *may* pass legislation, which *may* or *may not* become law, declaring anew the scope of Section 1981 and (b) the *Patterson* decision, only sixteen months old, has not been applied to claims of discriminatory discharge in all the circuits. On the one hand Respondent argues that judicial restraint is required because of what the law *may* become through legislation

and, on the other, he advocates judicial restraint because the *current* law has not been fully developed by all the circuits on the scope of *Patterson*. Clearly lurking under each of Respondent's claimed basis for judicial restraint is the compelling suggestion that the scope of *Patterson* needs to be addressed by this Court, in order to guide *both* the judiciary and the Congress from premature and/or unnecessary actions. According to Respondent, *Congress* is of the view *Patterson* does interpret Section 1981 to exclude discriminatory discharge claims from its coverage (even though Respondent also claims the issue was neither addressed nor determined and that any such reading of the scope of current Section 1981 renders the statute a virtual nullity) and the lower federal courts — while predominately of the same view — must be given additional time to develop the law of *Patterson*, even though, according to Respondent, any such judicial action will be rendered "functionally moot" if the Congress seeks in the next session and succeeds in passing legislation which would retrospectively overrule *Patterson*.

The Court is ever mindful of the Congress' power in the area of statutory interpretation, and acts in this area with knowledge that Congress remains free to alter what the Court may do. However, no special justification exists in this case constraining the court from interpreting Section 1981, particularly in light of *Patterson*: there has been *no* intervening development of the law, through extant action by Congress, which renders this Court's decision in *Patterson* unworkable or confusing. To the contrary, the Civil Rights Act of 1990 did not become law and any analysis of any possible legislative efforts is idle speculation. Respondent's plea to this Court for judicial restraint in an area where Congress *may* act could essentially be argued in *any* case involving statutory interpretation: this Court should stay its hand because the Congress has the *power* to act to legislate change in the statutory area presented for consideration. This Court's discretionary jurisdiction — and independence — is not so trammeled in this federal system.

Moreover, any possible subsequent legislative act does not render the current conflict existing in the circuits over the scope of Section

1981 as most recently interpreted in *Patterson* insignificant. Respondent suggests that this Court should deny the Petition for Writ of Certiorari in this case, as it recently did in *Sherman v. Burke Contracting, Inc.*, No. 90-5322 (Petition For Writ of Certiorari denied October 29, 1990), implying that the basis for this Court's denial of the Petition For Writ in *Sherman* was the insufficiency of conflict presented. Again, Respondent engages in rank speculation: as cited in Petitioner's original filing in this case (*see* Petition For Writ of Certiorari at p. 10), in *Sherman*, the Eleventh Circuit held that a claim of "retaliation" does *not* implicate the right to make a contract protected by Section 1981 — a holding consistent with Petitioner's reading of *Patterson* and the reading of the majority of the Circuits which have addressed the issue. Accordingly, this Court may have declined the Petition for the reason it considered the Eleventh Circuit's view correct. *See also Rodriguez v. General Motors Corp.*, No. 90-648 (Petition For Writ of Certiorari denied November 26, 1990) (Ninth Circuit held denial of promotion and demotion claims not actionable under Section 1981, applying *Patterson* racial harassment analysis).

Clearly, this Court recognizes its role to interpret what Congress may do and has done in the areas of private discrimination, to which the ordinance of the Constitution does not directly extend. *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363 at ___, 105 L.Ed.2d 132 at ___ (1989). However, Congress has done nothing to change the law as interpreted in *Patterson* and the question whether the Eighth Circuit's decision in this case failed to follow *Patterson* thereby revealing a true and significant conflict within the circuits merits issuance of the Writ of Certiorari herein.

CONCLUSION

For all the reasons stated herein and in the Petition for Writ of Certiorari, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS M. HANNA*
FRED A. RICKS
PATRICIA M. McFALL
McMAHON, BERGER, HANNA,
LINIHAN, CODY & McCARTHY
Suite 200
2730 North Ballas Road
St. Louis, Missouri 63131-3039
(314) 567-7350

Attorneys for Petitioner
**Counsel of Record*

EUGENE F. JORDAN
Associate General Counsel

Brown Group, Inc.
P.O. Box 29
8400 Maryland Avenue
St. Louis, Missouri 63166

December, 1990

(4)

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In the Supreme Court of the United States

OCTOBER TERM, 1990

BROWN GROUP, INC. D/B/A BROWN SHOE COMPANY, INC.,
PETITIONER

v.

KENNETH O. HICKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

DAVID K. FLYNN
LOUISE A. LERNER
LESLIE A. SIMON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the racially motivated discharge of an employee is actionable under 42 U.S.C. 1981.

2. Whether the instructions and special interrogatories submitted to the jury allowed the jury to find a violation of 42 U.S.C. 1981 in the absence of sufficient proof of causation.

3. Whether the court of appeals erred in declining to reverse the trial court's finding of liability, since the jury found that petitioner would have discharged respondent even if race had not been a factor in the decision.

4. Whether the district court's award of $1 in nominal damages, following the jury's determination that respondent was not entitled to actual damages, violated petitioner's Seventh Amendment right to a jury trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-324

BROWN GROUP, INC. D/B/A BROWN SHOE COMPANY, INC., PETITIONER

v.

KENNETH O. HICKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Respondent Kenneth Hicks, a white male, brought this action under 42 U.S.C. 1981 and the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* He claimed that his former employer, petitioner Brown Group, Inc., had unlawfully discharged him because of his race and age. See Pet. App. A1-A6. Petitioner denied those allegations and presented evidence that it had discharged respondent for legitimate, nondiscriminatory reasons. *Id.* at A3, A34-A35.

The case was tried before a jury in October 1988. The presiding magistrate gave the jury the following

Instruction No. 9 on the issue of liability (Pet. App. C1):

> Plaintiff is required to prove that his race or his age was either a determining factor or a discernible or motivating factor in the defendant's decision to remove plaintiff from his position.
>
> The term "determining factor" means a factor which made a difference in determining whether or not plaintiff was to be retained or terminated.
>
> The term "discernible or motivating factor" means a factor which was among two or more factors that played a part in, but did not necessarily control, the decision whether or not to retain or to terminate plaintiff.

Petitioner objected to this instruction on the ground that the use of the phrase "discernible or motivating factor" lessened the standard of proof required in a suit under Section 1981. Pet. App. A37.

The magistrate also submitted the following Special Interrogatories to the jury (Pet. App. C3-C4):

> 5. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a determining factor in his termination from employment by defendant?
>
> * * * * *
>
> 7. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a discernible or motivating factor in his termination from employment by defendant?
>
> * * * * *
>
> 10. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., would have terminated plaintiff Kenneth Hicks from employment, even had plaintiff's race or

age not been a discernible or motivating factor or a determining factor in the decision to terminate?

The jury answered "yes" to each of these Interrogatories. Pet. App. A44-A45, C3-C5. The jury also found that petitioner had not discriminated against respondent on the basis of age (Special Interrogatories Nos. 1 and 3), that respondent had not lost any back pay or benefits as a result of the racial discrimination (Special Interrogatory No. 6), and that respondent was entitled to $10,000 in punitive damages (Special Interrogatory No. 9). *Id.* at C3-C4. The jury was not asked to consider an award of nominal damages.

On October 26, 1988, the magistrate entered a judgment in favor of respondent for $1 in nominal damages and $10,000 in punitive damages. Pet. App. B1-B2.

2. a. Petitioner appealed the judgment, raising the following arguments: (1) a cause of action does not lie under 42 U.S.C. 1981 based on a discriminatory discharge from employment; (2) the district court erred in giving jury instructions and submitting special interrogatories that, by using the phrase "discernible or motivating factor," permitted the jury to find a violation of Section 1981 in the absence of sufficient proof that respondent's discharge was caused by intentional discrimination; (3) the district court's award of nominal damages violated petitioner's Seventh Amendment right to a jury trial; and (4) the evidence presented at trial was insufficient to support either the finding of liability or the award of punitive damages. Pet. App. A1-A2.

Respondent filed a cross-appeal, contending that the district court erred in denying his motion for reinstatement and related equitable relief. Respondent argued that he became entitled to such relief by virtue of the jury's finding (in response to Special Interrogatory No. 5) that his race was a determining factor in the discharge decision. He further argued that the jury should not have been allowed to answer Special Interrogatory No. 10 (which asked whether petitioner would have made

the same decision even if race had not been a factor), and that the jury's affirmative answer to that Interrogatory should be disregarded as surplusage, since the jury had already answered "yes" to Special Interrogatory No. 5. In the alternative, respondent requested a partial new trial to enable the jury to determine, in light of its finding that petitioner was motivated at least in part by race, whether race actually made a difference in the decision to discharge him. Pet. App. A44-A45.

b. On May 1, 1989, while the appeal and cross-appeal were pending, this Court rendered its decision in *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989), which involved a claim of gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Court held that in a "mixed-motive" case, a plaintiff must initially bear the burden of proving that an impermissible criterion such as gender was a "motivating" or "substantial" factor in the employment decision; if the plaintiff carries that initial burden, the defendant can avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even in the absence of the discriminatory motive. 109 S. Ct. at 1787-1788, 1790 (plurality opinion); *id.* at 1795 (White, J., concurring in the judgment); *id.* at 1796, 1798 (O'Connor, J., concurring in the judgment). After *Price Waterhouse* was decided, petitioner sought to raise a new issue in its answering brief on respondent's cross-appeal. Specifically, in answer to respondent's contention that Special Interrogatory No. 10 should be disregarded as superfluous, petitioner argued that the jury's finding in response to that interrogatory—that petitioner would have made the same decision to discharge respondent even if race had not been a factor—mandated entry of judgment for petitioner under *Price Waterhouse*. Pet. App. A45-A46.

c. On June 15, 1989, while the appeal and cross-appeal in the instant case were still pending, this Court ren-

dered its decision in *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989). In *Patterson*, the Court held that 42 U.S.C. 1981, which guarantees all citizens "the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens," "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations," but instead applies only to "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." 109 S. Ct. at 2372, 2374. The Court accordingly held that the racial harassment Patterson allegedly suffered during her employment was not actionable under Section 1981, because it was "postformation conduct by the employer relating to the terms and conditions of continuing employment," and did not involve "impairment of her ability to enforce her established contract rights." *Id.* at 2374.

3. a. On April 16, 1990, a divided panel of the Eighth Circuit affirmed the district court's judgment in all respects in this case. Pet. App. A1-A48. The court first concluded that *Patterson* left open the question whether 42 U.S.C. 1981 covers racially motivated discharges. Pet. App. A8-A14. It then held that discriminatory discharge claims continue to be cognizable under Section 1981. Pet. App. A14-A33. The court reasoned that, unlike racial harassment (at issue in *Patterson*) or discrimination in other terms or conditions of employment, a discriminatory discharge "totally deprives the victim of the fundamental benefit the right to make contracts was intended to secure—the contractual relationship itself." *Id.* at A17-A18. Thus, in the court's view, "[i]n order to give meaning to the right to make contracts free from discrimination, the right to be free from discriminatory discharge must be implied." *Id.* at A16. The court also believed that its interpretation was supported by the context in which Section 1981 was enacted, especially the importance attached in several studies during the Reconstruction period to establishing a "free contract labor system" to replace slavery. Pet. App. A21-A33.

Turning to the other issues raised by petitioner's appeal, the court of appeals held that the jury instructions and special interrogatories, "[c]onsidered as a whole, * * * adequately instructed the jury that [respondent] was required to prove intentional or purposeful discrimination to establish a Section 1981 violation." Pet. App. A38; see *id.* at A37-A38. Next, the court found sufficient evidence to support the jury's finding of liability and its award of punitive damages. *Id.* at A33-A37, A43-A44. Finally, it held that the district court's award of nominal damages did not violate the Seventh Amendment, because the jury's finding of liability automatically entitled respondent to nominal damages. *Id.* at A39-A43 (citing *Carey* v. *Piphus*, 435 U.S. 247 (1978)).

b. The court of appeals declined to consider the merits of respondent's cross-appeal, in which he argued that he was entitled to reinstatement and other equitable relief by virtue of the jury's finding under Special Interrogatory No. 5 that race was a determining factor, and that the district court therefore should have disregarded the jury's finding under Special Interrogatory No. 10 that petitioner would have made the same decision if race had not been a factor. The court of appeals concluded that because respondent had not objected at trial to the submission of Special Interrogatory No. 10 to the jury, that issue had not been preserved for appellate review. Pet. App. A46. Consequently, the court declined to consider petitioner's answer to the cross-appeal—namely, that under *Price Waterhouse*, the jury's answer to Special Interrogatory No. 10 mandated judgment in its favor. Instead, it left "for another day the determination of the precise effect (if any)" of *Price Waterhouse*'s allocation of the burden of proof under Title VII on Eighth Circuit precedents under Section 1981. Pet. App. A46.

c. Judge Fagg dissented on the ground that *Patterson* precluded an action under Section 1981 for a discriminatory discharge from employment. Pet. App. A47-A48.

4. Both parties petitioned for rehearing en banc. On June 4, 1990, both petitions were denied, with four judges dissenting. Pet. App. D1.

DISCUSSION

1. Petitioner first contends (Pet. 8-12) that the court of appeals' holding that racially motivated discharges are cognizable under 42 U.S.C. 1981 conflicts with this Court's decision in *Patterson* and with the post-*Patterson* decisions of other courts of appeals.

a. The court below concluded that *Patterson* did not foreclose a determination that a racially motivated discharge from employment is actionable under Section 1981. It noted that no claim of discriminatory discharge was before the Court in *Patterson* and that the Court did not specifically discuss the applicability of Section 1981 to such claims, make any mention of the Court's prior rulings on other issues in Section 1981 cases involving discriminatory discharges,[1] or refer to the large number of discharge cases under Section 1981 in the lower courts. Pet. App. A11-A14. Moreover, as the court below also observed, *id.* at A11-A12, two decisions of this Court since *Patterson* support the view that the discriminatory discharge issue remains open in this Court. In *Jett* v. *Dallas Independent School District*, 109 S. Ct. 2702 (1989), decided one week after *Patterson*, it was "assume[d] for purposes of these cases, without deciding, that petitioner's rights under [Section] 1981 have been violated by his removal" from his position. *Id.* at 2710. And in *Lytle* v. *Household Manufacturing, Inc.*, 110 S. Ct. 1331 (1990), another discharge case, the majority declined to apply the analysis in *Patterson* to the facts of

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[1] See Pet. App. A12 (citing *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987); *Saint Francis College* v. *Al Khazraji*, 481 U.S. 604 (1987); *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 276 (1976); and *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-460 (1975) (citing lower-court discharge cases)).

that case without the benefit of a full record or lower court determinations on the issue, *id.* at 1336 n.3, and Justice O'Connor wrote separately to note the Court's acknowledgement that "the question whether petitioner ha[d] stated a valid claim under [Section] 1981 remain[ed] open" on remand. 110 S. Ct. at 1338-1339.

Nonetheless, the seven other courts of appeals that have addressed the question since *Patterson* have all understood the Court's reasoning in that case to foreclose suits under Section 1981 based on an allegedly discriminatory discharge from employment, concluding that a discharge, like the harassment at issue in *Patterson*, is postformation conduct that falls outside Section 1981's prohibition against discrimination in the making or enforcement of contracts. See, *e.g.*, *Gonzalez* v. *Home Insurance Co.*, 909 F.2d 716, 722 (2d Cir. 1990);[2] *Williams* v. *First Union Nat'l Bank*, 920 F.2d 232, 233-234 (4th Cir. 1990); *Carter* v. *South Central Bell*, 912 F.2d 832, 839 (5th Cir. 1990);[3] *Prather* v. *Dayton Power & Light Co.*, 918 F.2d 1255, 1256-1258 (6th Cir. 1990); *McKnight* v. *General Motors Corp.*, 908 F.2d 104, 108-109 (7th Cir. 1990);[4] *Courtney* v. *Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Thompkins* v. *DeKalb County Hospital Authority*, 916 F.2d 600, 601 (11th Cir. 1990);[5] cf. *Hill* v. *Goodyear Tire & Rubber, Inc.*, 918 F.2d 877 (10th Cir. 1990)

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[2] See also *Patterson* v. *Intercoast Mgt. of Hartford, Inc.*, 918 F.2d 12, 13-14 (2d Cir. 1990).

[3] See also *Spiller* v. *Ella Smithers Geriatric Center*, 919 F.2d 339, 344 (5th Cir. 1990); *Reeves* v. *MCI Telecommunications Corp.*, 909 F.2d 144 (5th Cir. 1990) (per curiam); *Walker* v. *South Central Bell Telephone Co.*, 904 F.2d 275, 276-277 (5th Cir. 1990); *Lavender* v. *V & B Transmissions & Auto Repair*, 897 F.2d 805, 807-808 (5th Cir. 1990).

[4] See also *Sofferin* v. *American Airlines, Inc.*, No. 89-2662 (7th Cir. Jan. 29, 1991), slip op. 17.

[5] See also *Weaver* v. *Casa Gallardo, Inc.*, No. 89-3245 (11th Cir. Feb. 1, 1991), slip op. 1856-1857.

(holding retaliatory discharge claim is not actionable under 42 U.S.C. 1981, but declining to decide whether discriminatory discharge claim is actionable). The Eighth Circuit's decision in this case is clearly in conflict with these post-*Patterson* decisions of other courts of appeals.

b. Review by this Court ordinarily would be warranted to resolve a circuit conflict on an issue of such recurring importance. However, after the certiorari petition was filed in this case, and after the Court invited the Solicitor General to express the views of the United States, the Eighth Circuit granted rehearing en banc in another case to address the same issue. Because the Eighth Circuit—which stands alone—might eliminate the circuit conflict without intervention by this Court, we think that for the Court to grant plenary review in this case for that purpose would be premature.

Following the Eighth Circuit's denial of rehearing en banc (over four dissents) in this case, another panel of the same court expressed the view in *Taggart* v. *Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (1990), that the decision below is wrong (*id.* at 397 (citations omitted)):

> Absent the panel opinion in *Brown Group*, * * *, we would affirm the district court. In our opinion, the Supreme Court's decision in *Patterson* precludes section 1981 suits for discriminatory termination of employment. * * * Although we disagree with the *Brown Group* panel's interpretation of *Patterson*, "[a] decision of a panel of this court is the law of the circuit and we are compelled to follow it." *Dudley* v. *Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986). Only the court en banc can disregard this precedent.

On December 11, 1990, the Eighth Circuit granted rehearing en banc in *Taggart*. The court ordered supplemental briefing on the question whether Section 1981 applies to discriminatory discharges, and oral argument was held before the full court on February 1, 1991.

Thus, on the principal question presented, the petition for a writ of certiorari seeks review of a panel decision that is effectively being reconsidered by the en banc court of appeals—and may be overruled—in another case. There is no reason for this Court to grant plenary review of the issue at this time.

Moreover, the last Congress passed a bill that, *inter alia*, would have amended Section 1981 to make clear that it covers termination of employment and other contracts. S. 2104, 101st Cong., 2d Sess. § 12 (1990); see H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 8-9 (1990); 136 Cong. Rec. S15,407 (daily ed. Oct. 16, 1990); *id.* at H9994 (daily ed. Oct. 17, 1990). Although the President vetoed that bill, he did so for other reasons, and in fact the President at the same time urged adoption of an alternative proposal that likewise would have expanded the coverage of Section 1981 to cover the performance as well as the making of contracts. *Id.* at S16,418 (daily ed. Oct. 22, 1990).[6] A bill has been introduced in the current Congress that contains a similar provision to amend Section 1981. H.R. 1, 102d Cong., 1st Sess. § 12 (1991). Thus, it is possible that action by the current Congress will eliminate any continuing importance of the question whether Section 1981, as now in effect, covers discriminatory discharges.

For the foregoing reasons, we suggest that the Court grant the petition for a writ of certiorari in this case, vacate the judgment below, and remand the case to the Eighth Circuit for further consideration in light of its decision to rehear *Taggart* en banc. If the Court does so, the Eighth Circuit could dispose of the instant case as appropriate in light of whatever decision that court renders in *Taggart*. If the en banc court holds in *Taggart* that a discriminatory discharge is not actionable

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[6] The Administration previously had submitted a proposed bill during the last Congress that would have made clear that Section 1981 covers discriminatory discharges. See S. 2166, 101st Cong., 2d Sess. § 2 (1990); 136 Cong. Rec. S1522 (daily ed. Feb. 22, 1990).

under Section 1981, petitioner would prevail in this case, the additional issues petitioner raises (see pages 11-17, *infra*) would become moot, and the circuit conflict would be eliminated. Conversely, if the en banc court reaches the same conclusion in *Taggart* as the panel did in this case, and if the panel below thereafter reinstates its affirmance of the district court's judgment in favor of respondent, petitioner could once again seek review in this Court. Either way, subsequent legislative developments might shed further light on the need for review by this Court.

2. Petitioner also contends (Pet. 12-15) that the court of appeals erred in sustaining a verdict based on a jury instruction that permitted the jury to find liability if race was a "discernible or motivating factor" in the decision to discharge respondent. Petitioner is correct that the quoted standard of liability is not equivalent to the standard established by this Court in *Mt. Healthy City School District Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Price Waterhouse*.[7] However, the posture of this case and the context in which the instruction was given render the issue largely academic in this case and of no continuing importance generally.

In *Mt. Healthy*, the Court held that, in a challenge under the First and Fourteenth Amendments to a decision not to rehire a public employee, the plaintiff initially bears the burden of proving that his constitutionally protected conduct was a "substantial" or "mo-

[7] Although this Court has not stated whether the framework of *Mt. Healthy* and *Price Waterhouse* should be applied in employment discrimination cases under Section 1981, we see no reason why it should not. Compare *Patterson*, 109 S. Ct. at 2377-2379 (applying Title VII framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), to claim of discriminatory denial of promotion under Section 1981). We note as well that the Eighth Circuit held (prior to *Price Waterhouse*) that the same "mixed-motive" analysis should apply to claims under Title VII and Section 1981. See *Estes* v. *Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102 n.2 (8th Cir. 1988).

tivating" factor in the decision. 429 U.S. at 287. The burden then shifts to the defendant to prove that it would have made the same decision even in the absence of the protected conduct. *Ibid.* In *Price Waterhouse*, the Court applied a similar analysis to a "mixed motive" sex discrimination claim under Title VII, holding that if a plaintiff proves that gender (or another impermissible factor) played a "motivating" or "substantial" part in an adverse employment decision, the burden of proof shifts to the defendant, who can then avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even in the absence of the discriminatory factor. 109 S. Ct. at 1787-1788, 1790, 1795 (plurality opinion); *id.* at 1795-1796 (White, J., concurring in the judgment); see also *id.* at 1798-1799, 1805 (O'Connor, J., concurring in the judgment).[8] The Court declined to adopt the alternative approach previously followed by several courts of appeals (including the Eighth Circuit in *Bibbs* v. *Block*, 778 F.2d 1318, 1320-1324 (1985) (en banc)) that liability is established if the plaintiff satisfies his or her initial burden, described above, and that the employer's burden goes to the question of relief. 109 S. Ct. at 1784 n.2, 1787-1788 n.10 (plurality opinion); *id.* at 1796 (O'Connor, J., concurring in the judgment).

The trial in this case took place before *Price Waterhouse* was decided, when *Bibbs* v. *Block* governed the determination of liability in employment discrimination cases in the Eighth Circuit. At that time, the Eighth

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[8] It is unclear to what extent one or both of the concurring opinions in *Price Waterhouse* differed from the plurality opinion with respect to the threshold showing the plaintiff must make to shift the burden to the employer. See 109 S. Ct. at 1790 n.13 (plurality opinion); *id.* at 1795 (White, J., concurring in the judgment); *id.* at 1805 (O'Connor, J., concurring in the judgment). Any such difference has no bearing on this case, because the jury's finding that respondent's race was "a determining factor" (see pages 2-3, *supra*, and page 13, *infra*) presumably would satisfy the threshold standard under any of the three opinions in *Price Waterhouse*.

Circuit's approach to mixed-motive cases was to require a plaintiff to prove that race was either a "determining factor" or a "discernible or motivating factor" in an employment decision. Proof that race was a "determining factor" would establish liability and normally entitle the plaintiff to reinstatement and back pay. Proof that race was a "discernible or motivating factor" would also establish liability, but if the trier of fact found that the defendant would have made the same decision in the absence of the illegitimate factor, the plaintiff would not be entitled to reinstatement and back pay. See *Estes* v. *Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102 (8th Cir. 1988).

In this case, the jury found in response to Special Interrogatory No. 5 that respondent's race was a "determining factor" in the decision to discharge him, Pet. App. C3, which, under the district court's instructions, meant that respondent's race "made a difference" in that decision. *Id.* at C1. Under then-prevailing Eighth Circuit procedure, the jury should not have proceeded to answer Special Interrogatory No. 7. See *Estes*, 856 F.2d at 1102. But it did. Not surprisingly, the jury found in response to that Interrogatory that respondent had also satisfied the lesser burden of showing that his race was a "discernible or motivating factor" in the decision. That finding, however, was unnecessary to the jury's finding of liability, since it had already found that race was a determining factor. Thus, although the jury instructions *might* have permitted a finding of liability under an insufficient standard requiring nothing more than proof that race was one "motivating" or "discernible" factor, that did not happen in this case. Accordingly, any error in the reference in the instructions and special interrogatories to whether race was a "motivating" or "discernible" factor was of no moment even in this case. A fortiori, it does not present a question of broad importance warranting review by this Court.

This issue is especially unworthy of review because the district court's instructions and special interrogatories were given prior to *Price Waterhouse*, in the context of what petitioner characterizes (Pet. 13) as the "unique and confusing atmosphere" created by the special liability and burden-shifting rules adopted by the Eighth Circuit in *Bibbs* and *Estes*. See Pet. 12-13. As the Eighth Circuit has since acknowledged, *Price Waterhouse* will now require that court to modify its approach to mixed-motive cases under Title VII. See *Chaffin* v. *Rheem Mfg. Co.*, 904 F.2d 1269, 1274 (8th Cir. 1990). Presumably, *Price Waterhouse* will also require the Eighth Circuit to reevaluate its approach to mixed-motive cases under Section 1981 as well (see note 7, *supra*), although the panel below found it unnecessary to do so in this case. See Pet. App. A46. Because the effect of *Price Waterhouse* on Section 1981 cases was not decided below, and because this case was tried under different principles prior to *Price Waterhouse*, the instant case would not be an appropriate vehicle for consideration of that issue by this Court even if the issue otherwise warranted review.

3. Petitioner also contends (Pet. 15) that, under *Price Waterhouse*, a jury finding (rendered here in answer to Special Interrogatory No. 10) that the defendant would have made the same employment decision irrespective of considerations of race requires a verdict for defendant. Petitioner's argument is correct as a matter of law. But the court below did not rule to the contrary; it did not reach the question. Petitioner raised this argument in its answer to respondent's cross-appeal. Given the court of appeals' holding that respondent had not preserved the issue he sought to raise on his cross-appeal because he failed to object to the submission of Special Interrogatory No. 10 to the jury, the court had no occasion to reach petitioner's counter-argument based on Special Interrogatory No. 10. Pet. App. A46. There likewise is no occasion for this Court to do so.

Moreover, by answering "yes" to Special Interrogatory No. 5, the jury determined that race "made a difference" in petitioner's decision to discharge respondent. That finding would appear to satisfy the requirements under *Price Waterhouse* for finding an employer liable. Under applicable Eighth Circuit precedent, the jury should not then have been required to make a separate finding (here, in response to Special Interrogatory No. 10) on whether the employer would have made the same decision irrespective of considerations of race, just as the jury should not have answered Special Interrogatory No. 7 (discussed at page 13, *supra*). See *Estes*, 856 F.2d at 1102. That the jury nevertheless did answer that interrogatory, and gave a response that is seemingly inconsistent with its answer to Special Interrogatory No. 5, does not raise any issue of general importance. Rather, like petitioner's other objections to the jury instructions and interrogatories (discussed in point 2, *supra*), the wording of and jury responses to the interrogatories at issue here were tied directly to the Eighth Circuit's pre-*Price Waterhouse* precedents—and, indeed, to the district court's apparent failure to follow the procedure suggested by those precedents. Needless to say, such questions do not warrant review by this Court.

4. Finally, petitioner contends (Pet. 16-17) that the district court's award of $1 in nominal damages deprived petitioner of its Seventh Amendment right to a jury trial.[9] To begin with, the court of appeals' characteriza-

[9] Petitioner contends (Pet. 16) that the award of nominal damages is of practical significance in this case because, under *state* law, an award of at least nominal damages is a necessary predicate for an award of punitive damages. The court of appeals, however, concluded that the circumstances under which punitive damages are available under 42 U.S.C. 1981 turns on federal, not state law, and that under its precedents and those of other courts of appeals, respondent was entitled to nominal and punitive damages here. (The court further observed that it was not convinced that respondent would not be entitled to punitive damages even under Missouri

tion of the nominal damages award as "additur," Pet. App. A7, is somewhat misleading. The term "additur" usually refers to a trial court's denial of a motion for a new trial, conditioned on the defendant's consent to an increase in the amount of damages awarded to the plaintiff by the jury. See *Black's Law Dictionary* 38 (6th ed. 1990); 6A *Moore's Federal Practice* ¶ 59.08[8] (2d ed. 1989). This Court has held that that practice does indeed violate the Seventh Amendment, since a court may not "bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication." *Dimick* v. *Schiedt*, 293 U.S. 474, 486-487 (1935).

This case does not involve additur as traditionally defined, but rather the entry of an award of nominal damages following a jury's finding of liability in a civil rights action. The Eighth Circuit's approval of this procedure does not conflict with the decision of any other court of appeals. Lower courts have distinguished *Dimick* in a variety of situations in which there is no factual dispute as to the amount of damages to be awarded, see, *e.g.*, *Rocky Mountain Tool & Machine Co.* v. *Tecon Corp.*, 371 F.2d 589, 598 (10th Cir. 1966) (judge may increase damage award where amount of damages is established by law and jury has found liability); *Cummings* v. *Boston & M.R.R.*, 212 F.2d 133, 136-137 (1st Cir. 1954) (appeals court may increase award where trial court erroneously instructed jury on legal consequences of a payment); 6A *Moore's Federal Practice* ¶ 59.08[7], at 59-

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law.) Pet. App. A41-A43 & n.53. These subsidiary questions do not warrant review.

Moreover, the jury's verdict in this case establishes that the jury not only found petitioner liable for an intentional violation of Section 1981, but also believed that petitioner's conduct warranted an award of punitive damages in the amount of $10,000. There accordingly is no reason to believe that the jury would have declined to award $1 in nominal damages if it had been asked to consider that question as a necessary predicate for its award of punitive damages.

200 to 59-201; *id.* ¶ 59.08[8], at 59-217, and here there is no dispute as to the amount of nominal damages.

Lower courts have frequently awarded nominal damages in cases of racial discrimination. See, *e.g.*, *Edwards* v. *Jewish Hospital*, 855 F.2d 1345, 1350 (8th Cir. 1988) (holding that nominal damages are available for violation of Section 1981); *Howard* v. *International Molders & Allied Workers Union*, 779 F.2d 1546, 1533 (11th Cir.) (nominal damages presumed where liability found under Title VII and Section 1981), cert. denied, 476 U.S. 1174 (1986); *Irby* v. *Sullivan*, 737 F.2d 1418, 1433 n.30 (5th Cir. 1984) (plaintiff entitled to nominal damages in employment discrimination case under 42 U.S.C. 1983). Cf. *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978) (approving award of nominal damages in suit under 42 U.S.C. 1983 for procedural due process violation). The decision below is consistent with a recent decision from the Fifth Circuit, in which that court ordered an award of nominal damages based on a jury finding of liability in a suit under 42 U.S.C. 1983, observing that "[a]lthough neither the district court nor [the appeals] court has the power to add to the jury's verdict, when the amount of damages is not disputed and a party is entitled to damages under the verdict as a matter of law, [a court] may award that undisputed amount." *Taylor* v. *Green*, 868 F.2d 162, 165 (5th Cir.), cert. denied, 110 S. Ct. 127 (1989); cf. *Burt* v. *Abel*, 585 F.2d 613, 616 n.7 (4th Cir. 1978) (Seventh Amendment does not require jury trial where plaintiff's allegations entitle him to nominal damages only). Because the court of appeals' affirmance of the award of nominal damages on the basis of the jury's finding of liability in this case is consistent with the decisions of other courts of appeals, it does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further proceedings as appropriate in light of that court's order dated December 11, 1991, granting rehearing en banc in *Taggart* v. *Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (1990).

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

DAVID K. FLYNN
LOUISE A. LERNER
LESLIE A. SIMON
Attorneys

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